SEP 25 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 28.

THE WASHINGTON TERMINAL COMPANY,
Petitioner

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER, THE WASHINGTON TERMINAL COMPANY.

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SEPTEMBER 25, 1942.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 331-48), and the dissenting opinion of Mr. Justice Stephens (R. 348-81), were handed down on November 18, 1941, and are reported in 124 F. (2d) 235.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on November 18, 1941 (R. 382). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, 43 Stat. 938).

STATUTES INVOLVED.

This suit is brought under and in accordance with the Declaratory Judgments Act of June 14, 1934, c. 512, 48 Stat. 955, 28 U. S. C. 400 *et seq.*, as amended. The pertinent provisions thereof are as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Certain provisions of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151 *et seq.*) are involved because they have been relied on by respondents in the courts below. The portions of the Act principally concerned are Sections 3 First (i) and (p), which provide as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall

be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * * * *

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

QUESTIONS PRESENTED.

1. Whether or not Section 3 First (p) of the Railway Labor Act is to be construed, in the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, in a case where such a proceeding would otherwise be appropriate.

2. Whether or not Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes.

3. Whether or not the conclusion of the court below, to the effect that the unilateral submission of a dispute by employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the court to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Railway Labor Act, gives to the Railway Labor Act a construction which is unreasonable and is inconsistent with the construction placed upon it by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of such disputes was not intended to be exclusive.

4. Whether or not, in the face of Article III, Section 1, of the Constitution of the United States, and of the due

process clause of the Fifth Amendment to the Constitution, a construction of the Railway Labor Act, and more specifically Section 3 First (p) thereof, is to be chosen which would have the effect of making the awards of a non-judicial body, like the National Railroad Adjustment Board, to all practical purposes final and conclusive save at the option of the employes, and which would have the effect of closing the doors of the courts to railroad employers with the result of subjecting them to economic pressure in order to compel them to comply with such awards.

5. Whether or not, even if the National Railroad Adjustment Board is for the purpose of argument conceded to be a public quasi-judicial or administrative tribunal, the right of a party adversely affected by action of the Board, to a judicial reconsideration of the controversy passed upon by the Board, is to be denied, despite the policy of protecting the right to judicial review established by this Court in its recent decisions, especially in *Rochester Telephone Corp.* v. *United States,* and despite the fact that all the requisites for assertion of such right to review, as enunciated in those decisions, are satisfied in the case at bar.

STATEMENT.

Petitioner is a corporation which, since 1907, has operated the Union Passenger Station, including an adjacent railroad yard and tracks, in Washington, D. C. Respondents are petitioner's employes, who man its switch engines as engineers and firemen. The facilities of the passenger station and the adjacent yards and tracks are used by The Pennsylvania Railroad Company, the Baltimore & Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Com-

pany, and the Cheseapeake & Ohio Railway Company—called the Tenant Lines—which operate passenger trains to, from and through Washington. The petitioner itself operates no passenger trains and employs no road-engine or road-train crews.

It has been the continuous operating practice at the Terminal, since it was opened for use in 1907, that, when a loaded passenger train comes into the station at the end of its run and has discharged its passengers at the platform, the road-engine, manned by the road-engine crew which brought the train in over the road, may haul the empty passenger cars to the storage yard en route to the round-house, whenever, in the judgment of petitioner, the efficient and prompt operation of the Terminal is thereby promoted. Similarly, when the preparation of a passenger train to leave Washington is called for, the road-engine, manned by the crew which will operate the train over the road, picks up the empty cars on its way from the engine-house to the station, and backs the train of cars to the platform to receive passengers preparatory to leaving on its trip, whenever efficiency and promptness of operation so require. These road-engine crews are employes of the Tenant Lines. (Complaint, Pars. 8, 9, 10; R. 5.)

On February 1, 1923, a collective agreement in writing was entered into between petitioner and its yard-engine employes, the class of employes to which respondents belong. (Complaint, Par. 15; R. 6.) This agreement contained, among other things, provisions regarding so-called "seniority rights" of the employes, which were substantially the same as those which had been contained in the contracts of employment between petitioner and its yard employes since June 1, 1910. (Complaint, Pars. 12, 13, 14, 15; R. 6; Exs. A. B. C. D.; R. 15-39.) These "seniority rights" entitled employes to vacancies and new jobs in the order of seniority of the employes who applied for them, and also provided for seniority as

a factor in promotion. This agreement, with some immaterial amendments made from time to time, is still in effect. (Complaint, Par. 16; R. 7.)

After these agreements, containing substantially the same terms, had been in effect for many years, petitioner's yard employes advanced the contention out of which the present application for a declaratory judgment ultimately eventuated. That contention was to the effect that the agreement of 1923, by according "seniority" rights to yard-engine employes, thereby conferred upon such employes by necessary implication a monopoly or exclusive right to perform without exception all work on petitioner's premises capable of being regarded or defined as "yard work," and that such "yard work" must be construed as including the work of moving empty passenger trains between the station and the storage yard,—this despite the fact that, at the time of the original grant of seniority in 1910 and thereafter, both before and subsequently to the contract of 1923, such work had, under the practice and usage of the Terminal, continuously been performed by road engines of the Tenant Lines manned by road crews. (Complaint, Par. 19; R. 8.) In opposition to this contention, petitioner has consistently maintained that the 1923 agreement cannot lawfully be construed to confer on such employes any exclusive right to do the work claimed, in view of the practice known to, and understood by, the parties before and at the time when that agreement was made and since that time, in the light of which practice the contract must, on universally accepted principles of general contract law, be interpreted. (Complaint, Par. 32; R. 12.)

After this controversy originated and the yard employes' claims had been rejected by petitioner, the employes without the concurrence or consent or participation of petitioner submitted the claim to the First Division of the National Railroad Adjustment Board. This Board was created by the amended Railway Labor Act enacted by Congress in 1934.

That Act set up the National Railroad Adjustment Board for the "adjustment" of disputes between carriers and their employes arising out of contracts with respect to rules, rates of pay and working conditions. The Board is composed of a number of Divisions. The First Division consists of ten members, five selected by the railroads and five by the national railroad labor organizations. The Act designates the First Division as the one to hear disputes between the carriers and their train and engine service employes. (Complaint, Par. 19; R. 8.)

In accordance with the Board's practice, the First Division, upon receiving the claim of petitioner's yard employes, notified petitioner to file a statement of its position within 30 days, and thereafter fixed a date for the appearance of petitioner and the representatives of the employes. Under the Railway Labor Act (Section 3 First (i)), the Board was authorized to render an award at the request of one of the parties alone, and therefore petitioner was obliged to appear before the Board and separately state its contentions in opposition to the claims, at the risk of otherwise having an award or order of the Division entered against it by default. (Complaint, Pars. 19 to 22, inc.; R. 8.)

At the so-called "hearing" before the Division, witnesses could not be called and evidence could not be introduced because the rules of the Division forbade it. (Complaint, Ex. E; R. 40-43.) Thereafter, the Division was apparently unable to reach a decision because of the deadlock of its members, and, under the provisions of the Railway Labor Act (Section 3 First (l)), a Referee was appointed to sit with the Division and break the deadlock. In accordance with the Division's established practice, no opportunity was given petitioner to appear before the Referee or present to him written or oral arguments on the facts or the law. With the participation of the Referee, the Division decided the claim in favor of the employes, and, on October 24, 1938, it issued an "award" sustaining the claim. (Complaint, Pars. 24, 25, 26; R. 9.)

Petitioner, believing the award to be erroneous in point of law and not required by or in accord with the agreement of 1923, did not change its operating practices to conform to the award. Within a month after the date of the award respondents began to present, and have continued to present, claims and demands upon petitioner for sums of money that they allege they would have earned had they been permitted to perform the work which they claim they have a right to perform under the contract, but which is being performed by road-crews of the Tenant Lines. These claims for payments have been made notwithstanding the fact that many of respondents are and have been, during the period for which the claims are presented, actually engaged in performing yard work in and about the Terminal for which they are already receiving and have received full daily wages. Their demands amount to claims for wages which they contend they should be permitted to earn for performing work now being done by the road-crews of the Tenant Lines, in addition to the wages which they are actually earning. (Complaint, Par. 29; R. 11.)

The Railway Labor Act (Section 3 First (p)) authorizes a person for whose benefit an award by a Division of the Adjustment Board has been made to bring a proceeding to enforce the award in an appropriate United States District Court, within two years from the time the cause of action accrues under the award. No suit on the award in question has been instituted against petitioner. The Railway Labor Act makes no provision for a statutory method whereby the carrier against whom an award has been made by the Board can invoke the jurisdiction of the courts to determine the validity or legal effectiveness of the award.

The demands of respondents, if conceded in full by petitioner, would require the payment by it of a total amount of approximately $80,000 a year. Petitioner, in addition to being pressed by respondents for payment,

was confronted with the dilemma of having to decide between complying at once with the award and thereby waiving all opportunity for judicial determination of its rights and obligations under the contract of 1923, on which the award was purportedly based, or waiting until such time as respondents might choose to sue on the award, in which event petitioner might be compelled to pay the full amount of wages claimed by respondents for work not performed by them, up to the time of suit, in addition to the wages paid to other employes for performing that work. (Complaint, Pars. 28-32; R. 10-13, 57.)*

In other words, if the carrier, faced with an award against it of the kind involved in the present suit, should refuse to comply with the award and at the same time had no opportunity for initiating a proceeding for judicial determination of its obligations under the contract on which the award was purportedly based, the employes might wait until the last day of the two-year period before bringing an enforcement suit, in which event, if the enforcement suit were successful, the carrier would be obliged to pay for all the work in question done during the two-year period, as well as for the work done prior thereto since the presentation of the employes' claims, and to pay twice over for such work—once to the employes who in fact performed the work and a second time to the claimants who claim the right to perform the work but did not in fact do it. These circumstances would inevitably constitute a steadily increasing pressure on the carrier to comply immediately with the award by changing its oper-

* The fact that petitioner does actually pay for the services of the road crews in performing this work, in the form of reimbursement of the Tenant Lines whose employes the road crews are, is admitted by respondents in their Answer filed in the District Court below, where respondents, speaking of the services of the road crews of the Tenant Lines in moving empty and loaded cars in petitioner's yards, said: "* * * periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services" (R. 57). See also discussion in Judge Stephens' dissenting opinion (R. 367), answering discussion in the opinion of the majority of the Court of Appeals (R. 343-44).

ating practices and thereby reducing the damages to the amount of back wages accruing to the claimants up to the date of such change.

The experience of rail carrier-employers generally under the Railway Labor Act indicated that respondents would not sue promptly or at all on the award but would allow the full pressure of the circumstances to operate, reinforced by exertion of their own economic power, through threat of a strike, for the purpose of obtaining from the carrier full compliance with the award without a judicial determination of the basic rights and liabilities of the parties under their contract.*

Accordingly, petitioner, being desirous of having its rights under the contract judicially determined and having no other method open to it of achieving that result, instituted this suit under the Declaratory Judgments Act to obtain a judicial determination and declaration of its rights and liabilities under the contract of February 1, 1923. (Complaint, Par. 33; R. 13.)

Respondents, in the first defense set up by their answer, alleged that the complaint failed to state a cause of action. In the second defense of their answer, respondents contended—apparently because the complaint showed on its face the proceedings before the Adjustment Board—that:

> "(1) The Complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.
>
> (2) The Complaint affirmatively shows that there exists a remedy especially provided by statute for this type of case.
>
> (3) The Complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative Board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.

* See below, pp. 22-28.

(4) The Complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff." (R. 55.)

On the grounds thus alleged in the first and second defenses, the District Court, treating these defenses as a motion to dismiss, entered an order dismissing the complaint (R. 326). Petitioner appealed to the Court of Appeals, and that Court, after considering the case for nearly two years, affirmed the District Court in an opinion by Rutledge, *J.*, with Stephens, *J.*, dissenting (R. 331-81; 124 F. (2d) 235-77).

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that Section 3 First (p) of the Railway Labor Act is to be construed, despite the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate;

(2) In holding that Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer, with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment

Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes;

(3) In holding that the construction given by it to the Railway Labor Act, to the effect that the unilateral submission of such a dispute by the employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the courts to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Act, is not an unreasonable construction and is not inconsistent with the reasoning of this Court in *Moore* v. *Illinois Central R. Co.*;

(4) In holding that a construction of the Railway Labor Act which prevents the granting of the relief here sought by petitioner does not render that Act of doubtful constitutionality; and

(5) In affirming the judgment of the District Court below.

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals below, from which Judge Stephens dissented, should be reversed by this Court because:

1. The construction placed upon the Railway Labor Act, and particularly Section 3 First (p) thereof, by the majority of the Court of Appeals below is unwarranted and unreasonable, in that, although unsupported in the legislative history or the language of the Act or in any authoritative interpretation or statutory analogy, it nevertheless gives to the Act an operation which, under the facts in the case at bar, has the effect of compelling the carrier to submit to the method of "adjustment" provided therein—although clearly not intended by Congress to be a system of compulsory arbitration—and also of com-

pelling the carrier to accept as final, and to comply with, an award against it by the Adjustment Board—admittedly a non-judicial body—without any opportunity for a judicial determination of its legal rights and liabilities under the contract on which such award is purportedly based.

2. The present proceeding is an appropriate one for the exercise of declaratory judgment jurisdiction, in the absence of some statutory impediment thereto.

3. No such statutory impediment is presented by the Railway Labor Act. The majority of the Court of Appeals below are in error in concluding that to permit the maintenance of a suit like the present one would deprive the employes of advantages which Congress intended them to have under Section 3 First (p) of the Railway Labor Act, and for the preservation of which the procedure provided in that Section must, in the view of the majority below, be regarded as exclusive of any other method of obtaining a judicial determination of the rights and liabilities of the parties under their contract. The truth is that the institution of a proceeding like the present one does not in fact or in law prevent the employes from obtaining any advantages which Congress may have intended them to have by such a suit.

4. The decision of the majority of the Court of Appeals below, by construing the Railway Labor Act so as to give it a compulsory operation, is in conflict with the reasoning and decision of this Court in *Moore* v. *Illinois Central R. Co.*, wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes was not intended to be compulsory or exclusive but was intended to be a voluntary system of adjustment.

5. The construction placed upon the Railway Labor Act by the majority of the Court of Appeals below is not to be adopted if an alternative construction is available, because it would render that Act of doubtful constitutionality, in that its practical operation would be to deprive petitioner of any opportunity for a judicial determination of its rights and to compel it in fact to be bound by the award of a non-judicial body, to wit, the Adjustment Board.

6. Even if the Adjustment Board is for the purpose of argument conceded to be a public quasi-judicial or administrative tribunal—which petitioner insists it is not—nevertheless the policy established by this Court in its recent decisions, especially in *Rochester Telephone Corp.* v. *United States*, disposes of the contention that the issues determined by the Board should not be subject to judicial review and makes it clear that the declaratory judgment procedure is appropriate for securing such review.

7. To allow the judicial relief sought in this proceeding would not, as respondents contend, render the provisions of the Railway Labor Act unworkable, and is not forbidden by the "policy" of that Act.

ARGUMENT.

I. The Decision of the Majority of the Court of Appeals Below Places an Unwarranted and Unreasonable Construction Upon the Railway Labor Act, in That It Gives to That Act an Operation Which, on the Facts of This Case, Compels a Carrier to Submit to the "Adjustment" by a Non-Judicial Body of Its Legal Rights and Obligations Under a Contract With Its Employes, and After Such Adjustment Deprives the Carrier of Any Real or Effective Opportunity for a Judicial Determination of Such Rights and Obligations..

The decision of the majority of the Court of Appeals below holds that, where employes, without the consent or

concurrence of the carrier-employer, have submitted a dispute arising out of the interpretation of a collectively bargained agreement to the National Railroad Adjustment Board for "adjustment," thereafter the doors of the judicial courts are closed against the carrier-employer, nor may it have a judicial interpretation of its rights and obligations under such agreement, save at the election of the employes, who have no incentive to and in fact never do elect to seek such judicial interpretation. This is the plain and inescapable conclusion from reading the decision below, together with the provisions of the Railway Labor Act, in the light of the facts of the present case.

The Railway Labor Act of 1934 created the National Railroad Adjustment Board as a means of "adjusting" disputes arising out of contracts between carriers and their employes concerning rules, rates of pay and working conditions. After the possibilities for settling such a dispute through negotiation and discussion have been exhausted, the dispute may (Section 3 First (i)) be submitted to the Board either by both parties acting jointly or *by either party separately.* In a case where the Board has made an award, the Act provides in Section 3 First (p) for a method of judicial determination, on the initiative of the employes, of the rights and liabilities on which such award is purportedly based. No method for such judicial determination on the initiative of the carrier-employer is provided, but there is nothing in the Act or in its legislative history (see pages 33, 84-85 below) which purports to deny to the carrier-employer any right of action or recourse to any procedure which would otherwise be open to such employer—as, for example, a suit for a declaratory judgment.

The majority of the Court of Appeals below, however, has held in the case at bar that such a denial of the carrier's right to a judicial determination must be read into the Act, with the result that to all practical intents and purposes an award of the Adjustment Board in favor of

the employes becomes final against the carrier, without opportunity for judicial determination of the rights and duties on which the award is based, save at the election of the employes themselves. Moreover, for good and sufficient reasons, as shown below (pages 22-28), the employes have no incentive to make such election and in fact never do.

Petitioner submits that such a construction of the Act, in the absence of an express indication that it is required, is unreasonable and unwarranted, in view of the fact that the National Railroad Adjustment Board is not a judicial or quasi-judicial body, and in view of the further fact that such a construction of the Act, by barring the carrier-employer from access to judicial relief, exposes it to the cumulation of such severe penalties and to the exertion of such effective economic pressure from the employes as to compel it in fact to comply with the Adjustment Board's award, irrespective of the legality of the award.

A. The National Railroad Adjustment Board is not Entitled to be Regarded as a Judicial or Quasi-Judicial Tribunal, in View of the Manner in Which it is Constituted and the Nature of its Procedure.

The National Railroad Adjustment Board, because of the way in which its members are chosen and compensated and because of the procedure which it follows, cannot be regarded as a judicial or quasi-judicial tribunal (like the Interstate Commerce Commission, the Federal Communications Commission or similar bodies), whose adjudications may under some circumstances foreclose certain issues decided from being re-examined in a court of law. In the first place, the Board is not, and under the Act is not intended to be, a body of public administrative officials compensated from the public treasury. The Act provides (Section 3 First (a)) that the Board shall consist of members, half of whom are selected by the carrier and

half by such organizations of employes, nation-wide in scope, as have been or may be organized in accordance with the provisions of Section 2 of the Act. It is further provided (Section 3 First (g)) that "each member of the Adjustment Board shall be compensated by the party or parties he is to represent."* In this respect the Board is of course an altogether different type of body from a quasi-judicial tribunal like the Interstate Commerce Commission, whose members are appointed by the President and paid from the United States Treasury. The very phrase "to represent," used in the language just quoted from Section 3 First (g), in itself shows a Congressional view that members of the board do not sit in a judicial or quasi-judicial capacity but instead function as partisan *representatives* of the party or parties by whom they are compensated.

In the second place, the procedure followed by the First Division of the Adjustment Board is not that of a judicial or quasi-judicial body. Under the Act (Section 3 First (i)), the Board may render an award on the submission of one of the parties alone, without the joinder or appearance of the other party. If the carrier does appear, it is required by the First Division to answer the claim without seeing the "submission"—*i. e.*, the statement of its adversary's position—which is presented to the Board, and thus without having notice of the basis of the claim which must be answered. (Complaint, Par. 20, Ex. E; R. 8, 41-42.) At the so-called "hearings" before the Division, no witnesses are called to testify and no evidence

* The Act does provide that, where a referee is called in for the purpose of breaking a deadlock among the members of the Board, such referee shall be paid by the Mediation Board, which is a governmental agency (Section 3 First (1)). However, a referee who is thus called in for particular cases is not a regular member of the Adjustment Board, and is not a specially trained administrator, "informed by experience" of the specialized character which is found in the case of a member of the Interstate Commerce Commission, for example. (See *Illinois Cent. etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454 (1907).) Furthermore, his vote is only one of the votes which decide the case.

is introduced as to the facts relied on by the claimants; *ex parte* allegations are received by the Division as proof, without any opportunity to the parties for cross-examination or other means of testing the truth of the allegations. (Complaint, Pars. 22-23; R. 8-9.) No record, stenographic or other, is made of the hearing. (Complaint, Par. 23; R. 9.) If the Division is unable to reach a decision because of a deadlock among its members—as was the situation in the present case—a referee is called in under the provisions of the Act (Section 3 First (1)), and the referee joins in the decision of the case without hearing evidence and without any argument, written or oral, from the parties. (Complaint, Pars. 24-25; R. 9.) Finally, the award of the Division contains no findings of fact or conclusions of law, and in fact does not constitute an opinion in any proper sense. (See so-called "findings" and award in present case—Complaint, Par. 26; R. 9.)*

Clearly, this procedure is wholly unlike that followed by the Interstate Commerce Commission and other quasi-judicial tribunals. That the Adjustment Board is neither constituted nor operated as a judicial or quasi-judicial body has been freely admitted by the respondents in their briefs in the courts below (R. 86-87, 131). For example:

> "Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is

* Fuller details respecting the procedure of the Adjustment Board, showing that its procedure is as described above, are set forth in the monographs of the Attorney General's Committee on Administrative Procedure. See "Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board," compiled by "Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board," especially pp. 80-113, 224-248, 258-288, 290-349.

against him, his cause must surely be just and he will prevail." (Defendants' Memorandum Brief, p. 20, R. 86.)

And again:

"A judge *decides* the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it. 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." (Defendants' Memorandum Brief, p. 21, R. 87.)

Respondents have thus admitted that the Adjustment Board does not act judicially:

"Its own organization is not that of a non-partisan judicial tribunal, but of a bi-partisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it." (Defendants' Memorandum Brief, p. 65, R. 131.)

Indeed, respondents have gone so far as to state in their briefs below that the function of the Board is not the judicial one of interpreting and applying the basic agreement between the parties, out of which the dispute arises, but rather that of making new arrangements—in other words, a new agreement—between the parties if in the judgment of the Board such new arrangements are essential to a proper continuance of the parties' future relationship (R. 132-133). Thus, respondents have said:

"* * * *The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider

the nature of the decision which the Board is empowered to make in relation to a dispute before it.

"*The function of a court is to render a judgment between parties who are before it as litigants.* Such a judgment has the effect of establishing the parties' present rights. *With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary.* It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"*In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts.* The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but *the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption.*" (Defendants' Memorandum Brief, pp. 66-67, R. 132-133.) (Emphasis supplied.)

In view of these facts, and the admissions thus made by respondents, it is quite clear that the Adjustment Board is in no sense a judicial or quasi-judicial tribunal, with respect to its intended function, its composition, or its operation. And yet, the decision of the majority of the Court of Appeals below construes the Railway Labor Act so as to give it the effect of depriving a carrier in petitioner's position, who has been compelled by the em-

ployes' unilateral submission to be subjected to the issuance of an award against it by this non-judicial body, of any opportunity for a judicial determination of its rights and liabilities under its contract, save at the will of the employes in a suit brought to enforce such award under Section 3 First (p) of the Act. The result of that situation is that the carrier is forced by economic pressure to abide by the award of the non-judicial body without any judicial determination of its rights.

B. Under the Decision of the Majority of the Court of Appeals as Applied to the Facts of This Case, the Railway Labor Act Operates in Such a Manner as to Impose Upon the Carrier a Compulsory Method of Adjustment of Disputes With its Employes, and Deprives the Carrier of Any Opportunity for a Judicial Determination of its Rights and Liabilities.

Since the Railway Labor Act makes it possible for employes to submit a dispute to the Adjustment Board entirely without the consent of the carrier, it follows that if, after such a unilateral submission and the issuance of an award favorable to the employes, the carrier is denied—as it is under the decision of the majority below—the opportunity of obtaining a judicial determination of its rights except in a suit brought by the employes under Section 3 First (p) of the Railway Labor Act, then the carrier is in effect deprived of an opportunity to have its contract rights judicially determined, save at the option of the employes. But the fact is plain that it is not to the employes' interest to bring such a suit under Section 3 First (p), because, when an award is of such doubtful legality that it would probably not be sustained by a court, they can obtain compliance with the award as a result of the economic pressure of the circumstances and of their own economic power, which pressure ordinarily is sufficient to compel the carrier to com-

ply with the award.* The consequence is that the carrier is in effect compulsorily deprived of any opportunity for a judicial determination of its rights under the contract on which the award is purportedly based.

The fact that the adjustment procedure set up under the Act does as a practical matter operate in this compulsory way upon the carrier is clearly demonstrated by the circumstances of the case at bar.

The record shows that, when efficiency and promptness of operation require it, it is petitioner's present practice to employ the road-crews to do the work in question. (Complaint, Par. 10; R. 5-6.) It is not only petitioner's right but it is also in the public interest that petitioner's operations should be conducted in the most efficient and expeditious manner possible. Imposition upon petitioner of the requirement that the work in question should be done by respondents, in accordance with their claim and in place of petitioner's present practice, would on the allegations of the complaint—which must be taken to be admitted for the purpose of this stage of the proceeding—interfere with and impair the efficiency of petitioner's operations. The award of the Adjustment Board, in sustaining respondents' claim, requires in effect that petitioner change its operating practices in this respect, so as to permit respondents to do this work. Furthermore, the award, if complied with, requires that respondents be paid full wages for each day that they have not been permitted to do the work, subsequent to the presentation of their claims.

When a carrier in petitioner's position is faced with such an award of the Board as that sustaining respondents' claim, it has two alternatives before it. On the one hand, it can immediately comply with the award and change its operating practices so as to permit respondents to do the work. If it does so, it will be sacrificing its own interests, and also the public interest in efficiency of

* See below, pp. 26-28.

operation, without any judicial determination as to whether or not it is legally obliged to do so. On the other hand, it can refuse to comply with the award and continue its practices as they were before the award. But if it adopts the latter alternative, each additional day on which it continues to refuse to permit the employes to do the work will add to the amount which it will have to pay to them if it should be ultimately determined that the award of the Board rests upon a proper construction of the contract, and at the same time on each such additional day the carrier must continue to pay the employes who actually do the work. For example, if it adopts this second alternative, it may so happen that, on the 364th day of the second year following issuance of the Board's award, it will be confronted with a suit under Section 3 First (p) of the Railway Labor Act, which suit might, if the Board's award is upheld, result in the carrier's being compelled to pay back wages to the claimant employes for 728 more days' wages than would have been the case if the carrier had complied with the award on the day following its issuance, in addition to having paid the employes who actually did the work during all of that time (see pages 9-10 above).

In other words, the total cost to the carrier in connection with the dispute in question would be very much less if it sacrificed its right to a judicial determination of the issues and complied promptly with the Board's award than the cost would be if it refused compliance and was ultimately compelled to yield to the employes' demands by suit brought at the last possible moment under the Railway Labor Act. If a carrier in petitioner's position is to be denied declaratory relief in a proceeding like the present one, there is no way for it to avoid the risk of having ultimately to pay the much larger sum, except by prompt compliance with the award. It is obvious that, under such circumstances, the passage of time following the Board's award, and the consequent

mounting of the sum which the carrier may ultimately have to pay, operates to increase continually the pressure on the carrier to comply promptly with the Board's award. The result thereof would be to force the carrier to impair the efficiency of its operation, without a judicial determination as to whether or not it is legally obliged to do so.

Still more importantly, in addition to this pressure created by the circumstances of the situation, the organizations of the employes are always in a position to exert, and do in fact frequently exert, the full pressure of their economic power, through threat of a strike, to compel compliance with awards of the Board. This was admitted by respondents in their brief in the District Court below, where they said: "The orders of the Board find their primary sanction in the *collective economic bargaining power of the employees*" (R. 103). (Emphasis supplied.)* It is a well known fact that under modern conditions carriers are held primarily responsible by public opinion for the maintenance of undisturbed transportation operations, and this is a responsibility which carriers cannot afford to disregard. The threat of a strike directly impedes the proper discharge of this responsibility in such a way that it creates a serious and effective pressure upon the carrier to comply with the employes' demands, and so constitutes a weapon which can seldom be ignored or defied. Of course it is true that the Railway Labor Act provides for the appointment of an Emergency Board by the President in the case of a threatened strike, and prohibits any change in the *status quo* during the consideration of the dispute by such Emergency Board and for a period of thirty days thereafter.† However, this additional procedure provides no relief for the carrier, since there is nothing in the law to prevent the employes from renewing the pressure of their economic power after the expiration of thirty days following the decision of the Emergency Board, in the

* See also below, p. 27.

† Act of May 20, 1926, c. 347, sec. 10, 44 Stat. 586-87, 45 U. S. C. 160.

event that they do not like that Board's decision.* Moreover, resort to the Emergency Board procedure serves merely to prolong the delay which of itself operates to compel compliance with the award, and contains no more assurance of an ultimate judicial determination of the rights of the parties than does the procedure before the Adjustment Board. The function of the Emergency Board is not to determine judicially the legal rights and liabilities of the parties under the contract but merely to endeavor to find some method of settling the dispute, if possible.

These circumstances mean that, if declaratory relief is to be denied to a carrier in the position of petitioner in this case, employes having a dispute with the carrier may first compel a submission of the dispute to the Adjustment Board, without any consent on the part of the carrier, and may thereafter by economic pressure compel the carrier's compliance with an award by the Board in the employes' favor, without any judicial determination of the rights and liabilities of the carrier under its contract with the employes. The fact that the Railway Labor Act does in practice actually thus operate to compel compliance by carriers with awards by the Board against them is demonstrated by the almost complete absence of suits under Section 3 First (p) to enforce awards against carriers. The opinion of the majority below shows that, according to statistics available in 1938, out of a total of 3,134 decisions rendered by the Board up to that time, the claims against the carriers were sustained in full in 1,745 cases and in part in 394 additional cases—altogether, nearly two-thirds of the total (R. 336, note 11; p. 242 of 124 F. (2d)). And yet there were only two cases in which

* The events of the nation-wide wage controversy late in 1941, between the rail carriers and the employes' organizations, of which this Court may take judicial notice, wherein the employes' organizations refused to accept the decision of the Emergency Board appointed by the President and publicly announced they would call a strike unless that decision were modified, illustrated the possibility of a threatened strike against a decision of an Emergency Board not acceptable to the employes' organizations.

a judicial determination was had of the rights of parties thus concerned with an award of the Adjustment Board. One such case is cited by the majority below (R. 342, note 24; p. 246 of 124 F. (2d)), as the only case discovered of an enforcement suit under Section 3 First (p) of the Act: *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937). Another case of judicial review of Adjustment Board action is cited in Dean Garrison's article, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale L. J. 567, at p. 592 (an article which is referred to several times by the majority below), viz., *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722 (N. D. Ill., 1936). In this connection, the following passage from Dean Garrison's article is worth noting (pp. 591-92):

> "The Board has no powers of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance. This the union can do in two ways: first, by petitioning the appropriate United States District Court for an order enforcing the Board's award, pursuant to the procedure laid down by the statute; and secondly, by economic pressure. *The first course has not been adopted.* Out of 1,616 awards handed down by the four Divisions up to July 30, 1936, of which considerably over half must have been in favor of the employees, not one was taken to court for an enforcement order, and *the presumption is either that the carriers willingly complied in all these cases, or that, in some of the cases where the carriers did not at first comply, compliance was brought about by threatened strikes.*
>
> "The net result is that, with one exception, *no judicial review of the Board's capacity, procedure or decisions has been had, and none is likely to be had.*" (Emphasis supplied.)

It follows from what has been said, that the decision by the majority of the Court of Appeals below, denying to petitioner an opportunity for declaratory relief with respect to the issues on which the Adjustment Board's award against it purports to be based, construes the Railway Labor Act in such a manner as to permit it to operate, in connection with the economic pressure of the circumstances and of the employes' bargaining power, so as to impose on a carrier in petitioner's position a compulsory method of adjustment of disputes with its employes and to deprive the carrier of any opportunity for a judicial determination of its rights and liabilities with respect to such disputes

II. The Present Proceeding is an Appropriate One for the Exercise of Declaratory Judgment Jurisdiction, in the Absence of Some Statutory Impediment Thereto.

In view of the circumstances related above, it is clear that, in the absence of some statutory impediment, the present case is an appropriate one for the exercise of declaratory judgment jurisdiction, under the Federal Declaratory Judgments Act. Under that Act, the Courts of the United States have power "in cases of actual controversy * * * to declare rights and other legal relations of any interested party petitioning for such declaration whether or not further relief is or could be prayed." (See page 2 above.) The applicability of that Act to the present case is so fully and convincingly demonstrated in the opinion of Judge Stephens below (R. 358-66) that there is no need for elaborate discussion of it here. It is sufficient to point out that the facts of the case, as stated in petitioner's complaint (which facts must be taken as admitted upon the present motion to dismiss) clearly show that the case presents an actual controversy, consisting of specific claims for money made by respondents and refused by petitioner. (Complaint, Par. 29; R. 11.) Moreover, the demands of respondents are made, as re-

spondents have admitted,* under and on the basis of the contract between the parties, and not under the Board's award. The case is thus one of "actual controversy" with respect to the "rights and other legal relations" of petitioner and respondents under the contract between them. In such a situation a declaratory judgment proceeding initiated by the party defending against the claim is appropriate for determination of the rights of the parties, even though the claimant has available another procedure by which he could seek enforcement of his claim but to which he does not resort; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461 (1937).

Furthermore, the circumstances of the present case, whereby a carrier in petitioner's position is subject to increasing economic pressure toward compliance with the employes' demands, make declaratory relief not only an appropriate but a necessary remedy. As shown above, if the carrier refuses to comply with the award and takes no action, it incurs the risk of being ultimately compelled to pay much larger sums than it would if it complied promptly; while on the other hand, if the carrier submits itself to the award and complies promptly therewith, it sacrifices its right to a judicial determination of its obligations under the contract between it and its employes. The only solution to the dilemma in which the carrier thus finds itself is to obtain as promptly as possible a judicial determination of its rights and liabilities under the con-

* Thus, in their brief in the District Court below (included in the record of the Court of Appeals below and in the record filed herewith), respondents stated:

> "These claims, however, *are based upon the Agreement of 1923—not upon the order of the Board*" (R. 117). (Emphasis as in respondents' brief below, p. 51.)

Again, in the same brief (p. 53):

> "When the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect and is in itself unenforceable * * *. *The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued*" (R. 119). (Emphasis supplied.)

tract. Since the employes refuse to bring suit under Section 3 First (p) of the Act, and since the carrier has no other method of obtaining a judicial determination of its rights and obligations under the contract between it and the employes, a declaratory judgment proceeding becomes the only means available to petitioner for obtaining such necessary relief. If declaratory relief is granted and the carrier is thereby presently advised of its rights and obligations, it could if necessary change its operating practices promptly in response to an ultimate determination against it by the courts, and thus save itself from a substantial portion of the heavy penalty payments demanded by respondents. As stated by Judge Stephens in his dissenting opinion below (124 F. 2d at page 259; R. 356):

> "In *Aetna Life Ins. Co.* v. *Haworth, supra,* the mere increase in the amount of insurance policy claims through the accrual of interest, and the inconvenience of having to be prepared to meet the claims at some future time, were held sufficient grounds for declaratory relief in respect of legal rights and obligations arising under insurance contracts. *A fortiori* the uncertainties and hazards to which the appellant under the facts stated in the instant case is subjected are sufficient to invoke exercise of declaratory jurisdiction. In *E. Edelmann & Co.* v. *Triple-A Specialty Co.,* 88 F. 2d 852, 854 (C. C. A. 7th, 1937), Lindley, District Judge, speaking for the court, said, in respect of the purpose of the Declaratory Judgments Act:
>
> "'*It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued*'." (Emphasis supplied.)

The language thus quoted from the *Edelmann* case is exactly applicable to the situation in the present case.

Moreover, its soundness is substantiated by the legislative history of the Declaratory Judgments Act. In recommending passage of the Act, the Judiciary Committee of the Senate said (Senate Report 1005, 73d Congress, Second Session, 1934):

> "It enables disputes arising out of written instruments, or otherwise, to be adjudicated without requiring a destruction of the *status quo* and of the social and economic fabric. *Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed.*" (Emphasis supplied.)

Clearly, in view of the purpose of the Declaratory Judgments Act, as thus revealed in its legislative background and judicial interpretation, the present case is an appropriate one for declaratory relief, particularly in the light of the facts establishing the special need for such relief in this case. Nor can there be any question about the propriety of declaratory relief for the determination of rights and obligations under collective bargaining agreements such as that involved in this case. Both before and since the enactment of the Railway Labor Act of 1934, declaratory relief has been regarded by the courts as an appropriate remedy with respect to disputes arising out of contracts between carriers and their employes.* Finally, resort to a declaratory judgment proceeding is not barred, in a case of this kind, by the authorities which hold that such a proceeding may not be used in some circumstances to review the decision of another judicial or quasi-judicial tribunal, since that rule clearly does not contemplate awards of a body like the National Railroad Adjustment Board, which, as shown above (pp. 17-22), is

* See for example *Piercy* v. *L. & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1932); *Burton* v. *Or.-Wash. R. & N. Co.*, 148 Ore. 648, 38 P. 2d 72 (1934); *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749 (1936).

not constituted and does not operate in a judicial or quasi-judicial manner and is not in any sense such a tribunal. Even if it were properly to be regarded as a quasi-judicial or administrative tribunal or agency, this Court has now determined that, in the Federal courts at least, declaratory judgment jurisdiction may be exercised to review administrative action and to determine the rights of a party adversely affected by such administrative action: *Perkins* v. *Elg*, 307 U. S. 325, 59 S. Ct. 884 (1939).* (See discussion below, pp. 73-74.)

The majority of the Court of Appeals did not deny that the present controversy would be an appropriate one for the exercise of declaratory judgment jurisdiction in the absence of special statutory impediment. However, the majority below took the position that Section 3 First (p) of that Act must be construed as manifesting a Congressional intent that the procedure provided for therein should be exclusive of all other methods of judicial determination of the rights of the parties.

III. There is No Statutory Impediment to the Exercise of Declaratory Judgment Jurisdiction in This Case.

As stated above, the majority of the Court of Appeals below have concluded that there is a statutory impediment which prevents the exercise of declaratory judgment jurisdiction in this case, in that Section 3 First (p) of the Railway Labor Act must, in the view of the majority below, be construed to exclude any other proceeding, such as the present one, for the judicial determination of the rights and liabilities of the carrier and its employes under their contract. The reason advanced by the majority

* In that case, a declaratory decree establishing the petitioner's status as a citizen of the United States was rendered against the Secretary of State, the Secretary of Labor, and the Commissioner of Immigration and Naturalization, thereby in effect reversing the administrative action taken by those officers, who had ruled that petitioner was not a citizen.

below for this conclusion is that such construction is essential in order to preserve to the employes certain advantages under the Act which Congress must have intended them to have. Moreover, respondents have claimed that Section 3 First (p) of the Railway Labor Act must be thus construed as providing an exclusive remedy, because similar language in other statutes, viz., the Interstate Commerce Act and the Packers and Stockyards Act, has been so construed by the Courts. Petitioner submits that both of these contentions are unsound and are based on erroneous premises.

A. It is Erroneous to Conclude, as Does the Majority Below, That Section 3 First (p) of the Railway Labor Act Must, in Order to Preserve to the Employes Advantages Thereunder which Congress Intended Them to Have, be Construed to Exclude Any Other Proceeding, Such as the Present One, for the Judicial Determination of the Rights and Liabilities of the Carrier and Its Employes Under Their Contract.

It is not claimed by the majority of the Court of Appeals that there is anything in the legislative history of Section 3 First (p) of the Railway Labor Act to indicate that it was intended to be exclusive of all other methods of judicial determination of the rights of the parties, and such a claim could not successfully be maintained, because no reference whatever to Section 3 First (p) is to be found in the reports of legislative consideration given the Act in the Houses of Congress.* Moreover, there is no language in the Act itself which indicates that the procedure under Section 3 First (p) was intended to be exclusive. The majority below do, however, conclude that an intent on the part of Congress that the procedure under Section 3 First (p) should be exclusive must be inferred by implication from the provisions of that Sec-

*See House Report No. 1944 and Senate Report No. 1065, 73d Congress, Second Session, discussed more fully at pp. 84-85 below.

tion. The reason advanced by the majority for arriving at this conclusion is that the method of judicial determination provided in Section 3 First (p) gives to the employes certain definite advantages which Congress must have intended them to have and to retain unimpaired. The intent of Congress to secure these advantages to the employes would be frustrated, the majority below conclude, if the carrier of its own motion were permitted to seek judicial determination of its rights under the contract*

The basis for this conclusion of the majority is apparently that the advantages in question flow from the fact that in a proceeding under Section 3 First (p) the employes occupy the position of plaintiffs, and that if the carrier were permitted to maintain such a suit, as in the case at bar, the employes would lose the advantages accruing from their status as plaintiffs in a proceeding under Section 3 First (p), such as the advantage of the right to select the forum in which the suit is to be brought, from the relatively wide range of districts specified in the Act, and the advantage of selecting the time when the suit is brought.

If the underlying assumption on which this conclusion is founded is a sound assumption, viz., that the declaratory judgment procedure is not available when its effect would be to deprive the opposite party of procedural advantages which such party would otherwise have, the consequence would be to defeat every declaratory judgment proceeding, since in every such proceeding the party against whom declaratory relief is sought, and who would otherwise have the initiative, is deprived of the advantages which accompany that initiative, including the choice of venue and forum and of the time of bringing suit. Clearly, no such argument is tenable. This Court has held that the advantages which accompany the right of a beneficiary under

* See discussion in majority opinion below (R. 333-38; pp. 239-44 of 124 F. (2d)).

an insurance policy, for example, to bring suit against the insurer in order to enforce the policy do not defeat the right of the insurer to institute a proceeding for a declaratory judgment to determine an existing controversy with respect to the policy, in the absence of an actual suit by the beneficiary on the policy: *Aetna Life Ins. Co.* v. *Haworth, supra.*

There is an even stronger answer to the conclusion of the majority of the Court below on this point. The majority assumes that, if the present suit were permitted, the respondents would be deprived of the advantages which would accrue to them as plaintiffs in a proceeding under Section 3 First (p). This is not the case. The majority below have apparently assumed it to be the case, because they have made the fundamental mistake of failing to realize that the institution and pendency of a declaratory judgment proceeding, like the present suit, do not in any way bar the employes, in whose favor an award has been issued, from instituting suit under Section 3 First (p) and thereby securing for themselves all the advantages which would accrue to them as plaintiffs in such a suit. Under the governing principles and authorities it is clear that such a suit, if promptly instituted by the employes, could proceed to judgment, notwithstanding the prior institution of the declaratory judgment proceeding.

There are only two ways in which the prior institution of a declaratory judgment proceeding could conceivably interfere with a subsequent suit by the employes under Section 3 First (p), and in neither of these ways would the declaratory judgment proceeding have such an effect:

1. The existence of the previously instituted declaratory judgment suit might conceivably be regarded as constituting a bar to the second suit so as to cause the court having jurisdiction of the second suit to abate that suit pending final determination of the prior suit; but the decided cases have held otherwise.

2. The court having jurisdiction of the first suit might proceed in such a manner, *e. g.*, by enjoining the parties from prosecuting the second suit or by pressing its own suit to judgment—as to nullify the practical effectiveness of the second suit; but, again, this possibility is eliminated under established principles.

Under the decided cases it is clear that a suit begun by an employe or employes under the provisions of Section 3 First (p) of the Railway Labor Act to enforce an award of the Adjustment Board, subsequent to the institution by the carrier of a proceeding for a declaratory judgment, as in the present case, would in no way be barred or interfered with by the institution of the prior declaratory judgment suit.

1. *A Proceeding Such as the Present One Would Not Bar a Suit Subsequently Brought by the Employes Under the Provisions of Section 3 First (p) of the Railway Labor Act.*

It is well established by the cases that the fact that one court has assumed jurisdiction of a particular cause of action does not preclude another court from entertaining a suit involving the same subject matter except in the case of actions *in rem* or *quasi in rem*. This rule is set forth and is discussed at length in the decision of this Court in *Kline* v. *Burke Const. Co.*, 260 U. S. 226, 43 S. Ct. 79 (1922). In that case the construction company brought an action for breach of contract in a Federal court, the ground of jurisdiction being diversity of citizenship. Thereafter the defendants in that action instituted a suit in equity against the construction company in a State court, seeking an accounting and judgment under the contract. The construction company then sought in

the Federal court to enjoin further prosecution of the equity suit subsequently brought in the State court. The Supreme Court, in holding that such an injunction was properly refused by the District Court, pointed out that the injunction would have been proper to preserve the jurisdiction of the prior court over the *res* of the suit if there had been such a *res*, and then went on to say (p. 230 of 260 U. S.):

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * *The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.*" (Emphasis supplied.)

This principle has been directly applied to a situation closely analogous to the present one, in *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8th, 1939). There an insurance company instituted proceedings in a Federal court for a declaratory judgment of its rights and liabilities under certain insurance policies. In its petition the company included a request that the defendants, beneficiaries under the policies, be enjoined from prosecuting in any other court an action on any of the policies in question during the pendency of the declaratory judgment proceeding. On appeal from a decree dismissing the bill, the Circuit Court of Appeals held, first, relying on *Aetna Life Ins. Co.* v. *Haworth*, *supra*, that

the case was a proper one for the exercise of declaratory judgment jurisdiction, and second, relying on *Kline* v. *Burke Const. Co., supra,* that the insurance company had no right to an injunction against the prosecution of suits by the beneficiaries in other courts. The court said (pp. 31-32 of 102 F. (2d)):

> "Where one court takes jurisdiction of an action *in personam* seeking a judgment for money only, it does not affect the right or the duty of another court to try and adjudicate the same cause of action. *Kline* v. *Burke Construction Company,* 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. The fact that the declaratory judgment law has given the alleged debtor the right to initiate the action to adjudicate the dispute over the contract for the payment of money only, does not call for the application of any different rule. *The beneficiaries under these policies may maintain actions at law on the policies for recovery of money only, notwithstanding the pendency of the company's suit to have it declared that the company is not indebted on account of the same policies.*" (Emphasis supplied.)*

* This rule has been followed in many other cases, among which the more recent ones, involving circumstances of the same character as those in the *Roe* case, are: *Aetna Casualty and Surety Co.* v. *Yeatts,* 99 F. (2d) 665 (C. C. A. 4th, 1938); *Maryland Casualty Co.* v. *Consumers Finance Service,* 101 F. (2d) 514 (C. C. A. 3d, 1938); *Central Surety & Ins. Corporation* v. *Norris,* 103 F. (2d) 116 (C. C. A. 5th, 1939); *Ballard* v. *Mutual Life Ins. Co. of N. Y.,* 109 F. (2d) 388 (C. C. A. 5th, 1940).

Of course these cases are to be sharply distinguished from the group of cases in which subsequent suits between the same defendants and the same plaintiffs involving the same issues have been enjoined in order to prevent harassment from multiplicity of suits. But even this *quia timet* jurisdiction of the courts of equity will not be exercised "unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation": *Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276, 29 S. Ct. 426 (1909). To like effect are *Matthews* v. *Rodgers,* 284 U. S. 521, 52 S. Ct. 217 (1932), and *Moor v. Texas & N. O. R. Co.,* 75 F. (2d) 386 (C. C. A. 5th, 1935).

Another group of cases which must be distinguished from the present case consists of those involving suits for infringement of patent rights, as for

In the same manner, the respondents in the present case may institute on their own initiative and maintain actions under Section 3 First (p) of the Railway Labor Act, notwithstanding the pendency of a previously instituted suit, like the present one, to have the rights of the parties declared with respect to the same issues.

Clearly, therefore, a suit brought by the employes under Section 3 First (p) of the Railway Labor Act would not be barred by the existence of a prior suit for declaratory judgment, instituted by the carrier in another court, and the employes are accordingly free to begin such suit on their own initiative, for the purpose of securing whatever advantages may accrue to them therefrom.

Could the carrier, as party plaintiff in the prior suit, successfully apply to the court having jurisdiction of the second suit for a discretionary stay of the proceedings in the latter suit, on the ground of priority of the jurisdiction of the court in which the earlier suit was filed? The answer to this must of course be "no," for two reasons. In the first place, the cases and principles already reviewed show that no priority of jurisdiction is obtained by the suit which is filed first, where both actions are *in personam* and where there is no element of harassment. In the second place, the granting of a stay of proceedings already pending is a matter for the sound discretion of the court. Thus, in *Landis* v. *North American Co.*, 299 U. S. 248, 57 S. Ct. 163 (1936), this Court,

example, *Milwaukee Gas Specialty Co.* v. *Mercoid Corporation*, 104 F. (2d) 589 (C. C. A. 7th, 1939). A patent is in the nature of a *res*, in the sense that a suit for its infringement does not involve simply a personal liability but is concerned with issues as to the ownership of a particular device or thing. Accordingly, suits involving patent infringements generally fall within the exception to the general rule noted in *Kline* v. *Burke Const. Co.*, *supra*, whereby in the case of an action *in rem* or *quasi in rem* the exercise by a second court of jurisdiction over a *res* to which the jurisdiction of another court has previously attached would impair or perhaps defeat the jurisdiction of the first court.

speaking through Mr. Justice Cardozo, said (p. 254 of 299 U. S.):

> "• • • The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.*" (Emphasis supplied.)

If it is shown to the court having jurisdiction of the second suit, initiated by the employes under Section 3 First (p) of the Railway Labor Act, that Congress intended the employes to have certain advantages in the latter suit which they did not have in the declaratory judgment suit, it is wholly unlikely that the court in which the employe-initiated suit under Section 3 First (p) was pending would stay proceedings in that suit merely because of the fact that the declaratory judgment suit was filed first. To grant such a stay would, under those circumstances, clearly constitute an abuse of the court's discretion.

But, even though the employes' subsequent suit is not barred by the prior institution of the declaratory judgment action and could not be stayed on account of the prior suit, is it not possible that the prior suit would proceed to judgment before the conclusion of the second suit, so that the employes in the second suit might then be confronted with the judgment in the prior suit as the basis for a plea of *res adjudicata*? To this the answer must be that, if the procedure provided by Section 3 First (p) of the Railway Labor Act and invoked by the employes in the second suit does secure to the employes advantages which they cannot obtain in the first suit and which Congress intended them to have, as the majority below assume, then the court having jurisdiction of the first

suit would necessarily exercise its discretion to stay further proceedings in that suit and thereby permit the second suit to proceed first to judgment.

2. *Assuming That Congress Intended the Advantages of the Procedure Under Section 3 First (p) of the Railway Labor Act to be Preserved to the Employes, the Court Having Jurisdiction of the Declaratory Judgment Suit Would, in the Exercise of Its Discretion, Grant a Stay of That Proceeding Upon the Commencement of a Suit by the Employes Under Section 3 First (p); and to Do Otherwise Would Clearly be an Abuse of Discretion by the Court.*

As pointed out in *Landis* v. *North American Co., supra,* the granting of a stay of proceedings is within the sound discretion of the court having jurisdiction of the proceedings. Moreover, the facts as well as the reasoning in that case would afford ample authority to a court having jurisdiction of a previously instituted declaratory judgment suit for granting a stay of proceedings in that suit, upon application of the employes as plaintiffs in a suit filed under the provisions of Section 3 First (p) of the Railway Labor Act. In the *Landis* case, certain public utilities had filed suits in the District of Columbia against the members of the Securities and Exchange Commission to enjoin enforcement of the Public Utility Holding Company Act of 1935 on the ground of its unconstitutionality. At about the same time, the Securities and Exchange Commission filed a complaint in a Federal District Court in New York to compel certain other public utilities to comply with the Holding Company Act. Shortly thereafter a motion for stay of proceedings was filed on behalf of the members of the Commission in the District of Columbia suits, on the ground that to proceed with the trial of the District of Columbia suits simultaneously with the New York suit, when substantially the same issues were involved in both cases, would impede the orderly and

economical disposition of the controversy. The motion to stay proceedings in the District of Columbia was opposed on the ground that the parties were not the same as in the New York suit, but the motion was nonetheless granted by the District of Columbia Court. This was reversed by the Court of Appeals, but *certiorari* was granted by this Court, which reversed the Court of Appeals. In addition to the passage quoted above (page 40), Mr. Justice Cardozo said (pp. 254-56 of 299 U. S.):

> "Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical. * * * True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. *Considerations such as these, however, are counsels of moderation rather than limitations upon power.* * * * *We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.*" (Emphasis supplied.)

Thus, despite the fact that the parties were not the same in both the District of Columbia and the New York suits, although the issues were substantially alike, this Court remanded the proceedings to the District of Colum-

bia Court for the exercise of its discretion in the light of all the circumstances and of this Court's opinion. In the District Court's reconsideration of the motion for stay, "benefit and hardship will be set off, the one against the other, and upon an ascertainment of the balance discretionary judgment will be exercised anew" (p. 259 of 299 U. S.).

To like effect is the opinion of this Court in *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 57 S. Ct. 377 (1937). In that case an insurance company began an equitable action to cancel certain policies on the ground of fraud. Subsequently, the beneficiaries sued on the policies at law in the same court. After motions for dismissal were filed by the defendants in the equity action and were denied by the trial court, the parties in that action stipulated that the equity suit should continue and should be tried before the action at law was tried. In view of the stipulation, there could of course be no question as to the grant of a stay of proceedings. However, in reversing the holding of the Circuit Court of Appeals to the effect that the insurer had an adequate remedy at law and therefore its equitable action was improperly brought, this Court, again speaking through Mr. Justice Cardozo, used language which is particularly apt for the present case (pp. 212-15 of 300 U. S.):

> "No doubt it is the rule, and one recently applied in decisions of this court, that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available. • • • That being so, an insurer, though the victim of a fraud, may commonly stand aside and await the hour of attack. *But this attitude of aloofness may at times be fraught with peril.* • • • *Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there*

praying cancellation. • • • There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. Landis v. *N. American Co., 299 U. S. 248, 57 S. Ct. 163, 81 L. Ed. 153. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another especially where the parties and the issues are the same. Id. If request had been made by the respondents to suspend the suits in equity until the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity."* (Emphasis supplied.)

In the light of these cases, it is clear that if, following the institution by the carrier of a declaratory judgment proceeding of the kind here involved, the employes should begin suit in another court, in venue of their own choosing, under Section 3 First (p) of the Railway Labor Act, and should then apply to the first court for a stay of the declaratory judgment proceeding, it would be entirely within the discretion of that court to grant such a stay, since not only the issues but the parties as well would be the same. And if the employes could show to the court having jurisdiction of the declaratory judgment proceeding that Congress in enacting the Railway Labor Act intended them to have advantages which they could obtain only in their subsequent suit under Section 3 First (p), so that the intent of Congress as manifested in that Act would be better fulfilled by staying the declaratory judgment proceeding while the suit under Section 3 First (p) proceeded to judgment, it is certain that the stay of proceedings would be granted and that it would be an abuse of discretion on the part of the court to refuse such a stay.

In any event, the question would not arise in the present case, because counsel for petitioner in this case has expressly stated, in argument before the District Court (R. 300), that petitioner would raise no objection to permitting a suit by the employes under Section 3 First (p) of the Railway Labor Act, if such a suit were brought, to proceed in preference to the declaratory judgment suit.

The purpose of petitioner in instituting the present declaratory judgment suit is not to deprive the employes of advantages in litigation which they would have and which Congress intended them to have in a proceeding under Section 3 First (p) of the Railway Labor Act. Petitioner is concerned, not that it shall have judicial relief in any particular form, but that it may have an opportunity for judicial determination, in *some* form, of its rights and liabilities under the contract with its employes, and that it shall not be forced to comply with the Board's award without judicial consideration of the question whether that award represents a correct interpretation of petitioner's obligations under the contract. It has chosen this method of proceeding because it appears to be the only course open to it whereby it may have some hope of obtaining the judicial consideration which would otherwise, under the circumstances of the case, be barred to it. As stated by Mr. Justice Cardozo in *American Life Ins. Co.* v. *Stewart, supra,* "an attitude of aloofness may at times be fraught with peril," so that a party against whom a claim is threatened but not actually pressed to judicial decision may "be condemned to loss through the mere inaction of an adversary." That is exactly the situation of petitioner in the case at bar. What it seeks to accomplish by the present action is not the denial to respondents of advantages otherwise available to them, or the frustration of Congressional intent, but merely the protection of its fundamental right to a judicial determination of its obligations and liabilities with respect to a controversy under its contract with its employes.

Clearly, therefore, the majority of the Court of Appeals below erred in assuming that it was necessary to construe the Railway Labor Act so as to exclude a declaratory judgment proceeding like the present one, in order to preserve to the employes such advantages as Congress intended them to have in a suit under Section 3 First (p).

B. Respondents' Contention That Section 3 First (p) Must be Construed as Excluding Other Forms of Judicial Relief Because of Similarity in Language to Sections of the Interstate Commerce Act and the Packers and Stockyards Act Providing for Statutory Reparation Suits Under Those Acts is Unfounded.

The second principal ground on which it is urged that Section 3 First (p) of the Railway Labor Act should be construed as interposing a statutory impediment to the exercise of declaratory judgment jurisdiction in this case consists of the contention advanced by respondents in the courts below (but not relied on to any substantial extent by the majority of the Court of Appeals below*), that Section 3 First (p) must be construed as providing an exclusive remedy because similar language in other statutes—viz., the provisions permitting suits to enforce reparation orders for the payment of money, under the Interstate Commerce Act (49 U. S. C. Section 16(2)) and the Packers and Stockyards Act (7 U. S. C. Section 210 (f))—has been so construed by the courts.

This argument is without merit, for two reasons. In the first place, even assuming, as respondents apparently do, that the so-called reparation-suit provisions of the Interstate Commerce Act establish an absolutely exclusive judicial remedy, it is well settled that identical statutory provisions will not necessarily be given an identical construction unless *in pari materia;* and there is not merely

* See p. 250 of 124 F. (2d); R. 345-46. See also the careful discussion of this point in the dissenting opinion of Judge Stephens (pp. 269-71 of 124 F. (2d); R. 371-73).

an important difference in language between Section 16(2) of the Interstate Commerce Act and Section 3 First (p) of the Railway Labor Act, but the situations and circumstances to which the two provisions are respectively applicable differ in such significant respects that a construction appropriate to the one provision would not necessarily be appropriate to the other. In the second place, the decisions under the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, as respondents seem to suppose, but have simply held that where the statutory suit for reparation is available certain other remedies, as for instance an injunction suit to set aside the order, are not available.

1. *The Rule that Identical Statutory Provisions Should Ordinarily be Given Identical Construction Does Not Apply Because of Important Differences Between the Statutes in Question, viz., the Interstate Commerce Act and the Railway Labor Act, and those Statutes Are Therefore Not in Pari Materia and Not to Be Construed Alike.*

Identity in the language of two separate statutes does not lead to identity of construction where the two statutes are not *in pari materia, i. e.,* where they are not similar in objects and purposes and in the type of circumstances to which they apply. This is firmly settled in the cases.

A classic statement of the rule is that given by the Circuit Court of Appeals for the Eighth Circuit (including Circuit Justices Sanborn and Van Devanter) in *United States* v. *Colorado & N. W. R. Co.,* 157 F. 321 (1907), at page 330, as follows:

> "The rule *in pari materia* • • • the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable • • • because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different."

It would seem to require no argument to show that a statutory provision designed to enable individual shippers to collect money damages for past exactions of unlawful rates is directed against an entirely different evil and seeks to attain an entirely objective from another statutory provision designed to enable employes to compel their employer to assign to them in the future work to which they claim a right under a contract, and to exclude others from the performance of that work. The remedy provided by Section 16(2) of the Interstate Commerce Act is available only in the case of non-compliance by a carrier "with an order for the payment of money." The remedy provided by Section 3 First (p) of the Railway Labor Act covers any order of the Adjustment Board. The order of the Adjustment Board involved in the present case, and indeed most awards and orders of that Board, are in effect directions to the carrier as to its future operating practices, as well as orders to pay money damages. By sustaining a claim, the Board, in substance, says to the carrier that it must henceforth permit certain men to do certain work and not allow other men to do that work, and must also pay money damages for each day in which the claimants are not permitted to do the work. A legal proceeding to give effect by mandamus to a claim of that kind is altogether different in its incidents, consequences and repercussions from a suit merely to recover a sum of money. Accordingly, the grounds on which it might be held that a statutory action to recover a certain sum of money was by implication exclusive of all other forms of judicial remedy would have no necessary applicability to the determination of whether or not the statutory proceeding to enforce a claim to certain work was exclusive. By their difference in terms, the one statute referring only to money claims and the other covering claims to enforce future conduct, the two statutory provisions differ in such an essential particular that rulings with respect to one are not controlling with

respect to the other, under the *in pari materia* rule above stated.

Furthermore, the situations and circumstances to which Section 16(2) of the Interstate Commerce Act and Section 3 First (p) of the Railway Labor Act are respectively applicable differ in such significant and material respects that a construction appropriate to the one provision would not be appropriate to the other.

Attention has already been called above (pages 22-28) to the economic pressure to which a carrier-employer is subjected, under the facts of this case, to comply with the award without a judicial determination of its rights. This pressure is not present in the case of mere claims for money damages based on past transactions which do not affect operating methods and practices for the future. The significance of an award of the Adjustment Board with respect to the future operating practices of the carrier lends an altogether different and more pressing character to the carrier's need for judicial determination of its rights than is the case in connection with a reparation order of the Interstate Commerce Commission. Not merely must the carrier run the risk of choosing between immediate compliance with the award of the Adjustment Board by a change in its method of operation or of having to pay a much larger sum, if the claimant ultimately brings the statutory action and the claim is sustained, but the carrier is furthermore exposed, as already pointed out, to the pressure of the economic bargaining power of the employes. None of this pressure is present in the case of a reparations claim for damages under the Interstate Commerce Act. The presence of such pressure in the one case and its absence in the other establishes such a plain difference between the two statutes—a difference which is reflected in the fact that one statute is expressly limited to money claims while the other is not—that under the *in pari materia* rule it seems clear that a construction of the one statute giving a quality of exclusiveness to the

remedy therein provided is not by necessary or even reasonable implication transferable to the other.

2. *The Decisions Under the Reparation-Suit Provisions of the Interstate Commerce Act Do not Go so Far as to Establish Any Absolute Rule of Exclusiveness, but Simply Hold that Where the Statutory Suit for Reparation is Available Certain Other Remedies are not Available.*

The considerations just advanced impel the conclusion that, even if Section 16(2) of the Interstate Commerce Act and the analogous provisions of the Packers and Stockyards Act had been so construed as to provide that the statutory actions created by those Sections were absolutely and in all respects exclusive of all other forms of judicial remedy, it would not follow by necessary implication that a like quality of exclusiveness must, as respondents contend, attach to the statutory remedy under Section 3 First (p) of the Railway Labor Act. However, the decisions under the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, but have simply held that where the statutory suit for reparation is available certain other statutory remedies are not available.

Thus, for example, it has been held that, where the Interstate Commerce Commission has made a reparation order so as to entitle the successful claimant to bring an action under Section 16(2), the order of the Commission is not of such a character as to conform to the definition of an order under paragraph 28 of Section 41 of the Judicial Code authorizing a suit to enjoin certain orders of the Commission, and accordingly a suit to enjoin a reparation order may not be brought under that section. *Baltimore & O. R. Co.* v. *United States,* 87 F. (2d) 605 (1937). Likewise, in the earlier case of *Brady* v. *Interstate Commerce Commission,* 43 F. (2d) 847 (1930), it was

said that, since a reparation order is not enforceable by the Commission, a suit for a statutory injunction under that section of the Judicial Code will not lie against the Commission to restrain or set aside the order.

These decisions are wholly intelligible without the necessity of presupposing any absolute rule that the judicial remedy provided by Section 16(2) of the Interstate Commerce Act is exclusive of all other forms of judicial relief. Their holding has no direct bearing upon the disposition of the case at bar. The present proceeding is not a suit for an injunction. If it were, it would have been brought against the National Railroad Adjustment Board in Chicago. Petitioner is not contending that the award of that Board can be enjoined. On the contrary, petitioner is here contending merely that the award should not operate as a bar to the exertion of petitioner's present legal rights, including the right to have its contract relations with the respondents adjudicated in a proceeding for a declaratory judgment.

Respondents have asserted below that the statutory procedure under Section 16(2) of the Interstate Commerce Act operates to bar a shipper who has failed to win an award before the Interstate Commerce Commission from subsequently proceeding in court against the carrier, and cited for this proposition *Minds* v. *Pennsylvania Railroad Co.*, 237 F. 267 (1916) (see R. 108), thereby seeking support for the contention that because of Section 3 First (p) of the Railway Labor Act an employe who has failed to win an award from the Adjustment Board is henceforward barred from any form of judicial relief on his contract rights against the employer. The *Minds* case was a suit by a claimant who had been successful before the Commission, and is, therefore, not authority for the proposition for which it is cited. In fact it now seems to be clear that a shipper who has been refused relief by

the Interstate Commerce Commission is not by that fact alone barred from further resort to the courts: see *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 136-40, 59 S. Ct. 754, 760-64 (1939). Petitioner submits that, so far as the cases are concerned, it is an open question whether an employe who has failed to win an award from the National Railroad Adjustment Board may or may not sue the employer on his contract under the general jurisdiction of the courts. Even if it should be held that he may not, this would not preclude the employer from a right to sue, since the position of the employer against whom an award has been entered, without his consent even to have the controversy submitted to the Board, is so essentially different, and his need for judicial relief is correspondingly so much greater (see pages 22-28 above), that the considerations which would apply to him are not the same as those upon which the right of the employe to sue might be denied after such employe has voluntarily chosen the Board as his forum for relief and has failed to win its support for his claim.

It follows from what has been said above, first, that even if it were true, as respondents contend, that the cases establish an absolute rule of exclusiveness with respect to the methods of review provided in Section 16(2) of the Interstate Commerce Act and in the analogous sections of the Packers and Stockyards Act, nevertheless those provisions of the Interstate Commerce and Packers and Stockyards Acts cannot be considered to be *in pari materia* with Section 3 First (p) of the Railway Labor Act, and therefore do not provide an apt statutory analogy to that section, and second, that the cases do not in fact establish any such absolute rule of exclusiveness even with respect to the methods of review provided in those sections of the Interstate Commerce and Packers and Stockyards Acts.

IV. The Decision of the Majority of the Court of Appeals, in so Construing the Railway Labor Act as to Give to the Adjustment Procedure Provided Therein a Compulsory Effect in its Practical Operation, is in Conflict with the Reasoning of This Court in Moore v. Illinois Central R. Co.

Subsequent to the argument of the instant case in the Court of Appeals, but prior to publication of the decision of that Court, this Court decided the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941). Both the majority and the dissenting opinions in the Court of Appeals discuss the *Moore* case, although there had been no argument before the court as to its applicability to the present case. The decision of this Court in the *Moore* case squarely establishes the proposition which petitioner herein advanced in the Court of Appeals, to the effect that the method provided in the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes is not an exclusive or compulsory method for the adjustment of such disputes. In so holding, this Court said that the adjustment procedure provided in the Railway Labor Act was not "based on a philosophy of legal compulsion," but was essentially a "system for peaceful *adjustment and mediation voluntary in its nature.*" (Emphasis supplied.)*

* In that case suit was brought in behalf of an employe against the railroad for damages for breach of contract, and this Court, in sustaining the district court's judgment for the employe, rejected the argument that the suit was prematurely brought because the employe had failed to exhaust the so-called "administrative" remedies granted him by the Railway Labor Act. The pertinent language of the Court, speaking through Mr. Justice Black, was as follows (pp. 634-36 of 312 U. S.):

> "But we find nothing in that Act [*i. e. the Railway Labor Act*] which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to file a suit in court. * * * For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. *On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.*" (Emphasis supplied.)

It has been shown above (pages 22-28) that the denial by the majority of the Court of Appeals to the carrier of an opportunity for a judicial determination of its basic rights otherwise than by a proceeding brought by the employes under Section 3 First (p) means that a carrier having a dispute with its employes may be compelled, by unilateral submission of the dispute on the part of the employes to the Adjustment Board, to subject itself to a decision of that Board under the adjustment procedure provided in the Railway Labor Act, and may further be compelled, by economic pressure, to comply with an award of the Board against it, without any judicial determination of its rights and liabilities under the contract on which the award is purportedly based. Clearly, a system of adjustment which operates in such a manner can only be described as in fact compulsory, and the decision of the majority below must be considered as so holding. In that respect, it is directly in conflict with the reasoning of this Court in the *Moore* case. If a carrier is denied the opportunity of obtaining judicial relief in a proceeding like the present one, the method of adjustment provided in the Act, so far from being a system "voluntary in its nature," is in fact one which operates in actual practice to *compel* the carrier to abide by the result of the adjustment method. A method of adjustment which operates in that manner is in no sense voluntary, in so far as the carrier is concerned.

The majority of the Court of Appeals apparently recognized the inconsistency between the result which they reached and this Court's decision in the *Moore* case, and attempted to establish a distinction between the two cases. The majority below conceded that, under the *Moore* decision, the method of adjustment provided in the Act was one which the parties were not obliged to choose in the first instance, and that the employes, for example, could ignore the statutory procedure altogether and recover against the carrier in a suit for damages. However, the majority below took the further position that

there was no conflict with the *Moore* decision in holding that, when the parties had once "voluntarily" invoked the method of adjustment provided in the Railway Labor Act, they were thereafter bound to abide by that method, and, when an award of the Board had been issued, were limited to the procedure provided in Section 3 First (p) of the Act, as the only means of obtaining a judicial determination of the rights of the parties under the contract on which the award was purportedly based.

This conclusion is erroneous for two reasons: *first*, it fails to distinguish between a joint submission by the parties under Section 3 First (i) of the Act and a separate submission under the same paragraph by the employes without the joinder or consent of the employer; and *second*, even if this distinction is ignored, the conclusion of the majority below rests upon assuming the very point to be proved, namely, that where there has been a voluntary resort to the adjustment procedure the statutory judicial remedy under Section 3 First (p) must be treated as exclusive—an assumption which is based solely upon the argument shown above (pages 33-46) to be unfounded, that otherwise the employes would be deprived of advantages which Congress intended to secure to them.

A. THERE IS NO ELEMENT OF CHOICE OR VOLUNTARY ELECTION ON THE PART OF A CARRIER IN APPEARING BEFORE THE BOARD TO DEFEND ITSELF AGAINST THE UNILATERAL SUBMISSION OF A DISPUTE BY AN EMPLOYE IN ORDER TO AVOID A DEFAULT AWARD.

1. *The Separate Appearance by a Carrier Before the Board in Opposition to the Unilateral Submission of a Dispute by an Employe is Distinct in Character from a Joint Submission by Both Parties, and is not Voluntary on the Part of the Carrier, Because Such Separate Appearance is Essential from the Carrier's Standpoint in Order to Avoid the Default Award Which the Board Would Otherwise Enter Against It.*

The majority below treat the submission of the dispute to the First Division of the Adjustment Board in the

present case as a joint submission or a submission with the consent or participation of petitioner, and conclude therefrom that such consent on petitioner's part thereafter barred it from obtaining a judicial determination of its rights otherwise than as such determination might be obtained if respondents after the award should bring a suit under Section 3 First (p). The notion of the majority below seems to be that where, as in the present case, the carrier separately appears before the Board to avoid the entry against it of the default award which would otherwise result from the unilateral submission of a dispute by the employes, which submission the carrier had refused to join, such separate appearance constitutes a voluntary choice or election on the part of the carrier of the method of adjustment provided in the Railway Labor Act, including the procedure set up in Section 3 First (p) thereof, as the appropriate method of settling the dispute.* The defectiveness of this reasoning is plain. It results from ignoring the fact that, under the Railway Labor Act (Section 3 First (i)), the adjustment procedure therein provided may be invoked by either party, acting separately, by the submission of the dispute to the Board by such party without the consent or concurrence of the other party or parties to the dispute.†

As a consequence of this provision in the Act, the Board has claimed, and has in fact exercised (as appears from its published reports) the power to enter an award, in

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*See discussion in majority opinion below (R. 338, 345; pp. 243-4, 249 of 124 F. (2d)). The comments on this point in a footnote to the opinion (R. 332, note 5; p. 239 of 124 F. (2d)) suggest a confusion in the minds of the majority between questions as to a court's power over the *person* of a party, which is conceded by a general appearance by that party, and questions as to its power in other respects to adjudicate the issues before it, which is not conceded by such an appearance. Jurisdiction of the person may be conceded by a general appearance, but jurisdiction of the subject-matter is not, and it is the latter type of jurisdiction which is here in question.

†The language in Section 3 First (i) is that disputes of the kind contemplated by the Act "may be referred by petition of the parties *or by either party*" to * * * the Adjustment Board. (Emphasis supplied.)

the case of a dispute so submitted, regardless of whether or not the carrier appears before it. The reports of the Board indicate that, if employes submit a dispute and the carrier refrains from appearing before the Board in opposition to the employes' claim, the Board simply enters an award in favor of the employes, as a matter of course, irrespective of the merits.* Under such circumstances, the separate appearance of the carrier in opposition to a unilateral submission of the dispute by the employes is not in any sense a voluntary election on the part of the carrier to resort to the statutory method of adjustment—as might be true in the case of a joint or concurrent submission by both parties—because the Board would proceed without such appearance by the carrier and would enter an award against it for mere default of appearance. When an employe unilaterally submits a dispute to the Board without the consent of the carrier, the only sensible course open to the carrier is thus to appear separately before the Board and attempt to defend itself. In view of the fact that the Board is, under the provisions of the Railway Labor Act, empowered to hear and decide a dispute on the submission of one party alone, refusal on the part of the carrier to appear and defend itself on the merits before the Board would be as unwise and as neglectful of the carrier's rights as it would be for a defendant in a Federal court proceeding to refuse to present its case on the merits to the court after a denial of its motion to dismiss for want of diversity of citizenship or other like jurisdictional basis.

There is at the same time a broader standpoint from which this matter must be viewed—the standpoint of public policy and of the rational effectuation of Congressional intent. The majority below apparently take the position that a carrier, against whom a claim has been filed before the Adjustment Board, can only protect its

*Vol. 12, "Awards 2066 to 2200, First Division, National Railroad Adjustment Board," pp. 318-370, inclusive (Government Printing Office).

position by ignoring, and in order to protect its position must ignore, the Adjustment Board—that it can only obtain a legal adjudication of its rights by a judicial body if it absolutely and completely refuses to have anything to do with the statutory agency set up by Congress. Surely, this is an unrealistic and unduly technical approach to a problem of great magnitude. It says, in substance, that the carriers are entitled to a judicial determination of their rights only if they refrain from dealing with the adjustment procedure established by the Railway Labor Act. As a practical matter, how can the carriers refrain from dealing with that machinery? Does anyone suppose that, in practice, the carriers could properly and successfully adopt a policy of ignoring the Adjustment Board and its awards, in cases which are submitted to the Board by the employes whether or not the carriers concur or join in the submission? The existence of the adjustment procedure, its establishment by Congress, its embodiment as an important provision in the Railway Labor Act, and the expectation founded upon it by the carriers' employes, all preclude the possibility of the course which the majority of the Court of Appeals say that the carriers must follow if they are to protect and observe their right to a judicial interpretation of their contracts.

It follows from these considerations that the status of an award of the Adjustment Board with respect to the rights of a carrier should not and cannot be regarded as in any respect altered or enhanced by the fact that the carrier may have appeared, as in the present case, to avoid a default award against it. Accordingly, petitioner's separate appearance before the Board, in order to avoid having the Board make a default award against it, cannot be treated as equivalent to a joint submission of the dispute to the Board, because it was not in any proper sense voluntary. A joint submission might perhaps have constituted, on the part of petitioner, a voluntary choice or election of the adjust-

ment method, of the kind the majority below had in mind. But there was no such joint submission. Therefore, there was no voluntary acceptance by petitioner of the adjustment method. The petitioner appeared merely to avoid a default award, and therefore its appearance cannot be held to constitute a waiver of any right to a judicial determination which petitioner would have in the absence of a joint submission to the Board.

2. *The Doctrine of Election of Remedies, on Which the Attempt of the Majority Below to Distinguish the Moore Case Appears to Rest, Has no Application to the Present Case.*

In attempting to distinguish the present case from the *Moore* case on the assumption that the petitioner's separate appearance before the Board constituted a voluntary choice or election of the statutory method of adjustment, the majority below seem to have in mind the notion that petitioner's separate appearance before the Board constituted an "election of remedies" so as to bring into operation the doctrine according to which the election of one remedy may under some circumstances bar a subsequent shift to another inconsistent remedy. But this doctrine is not applicable to the present case, for two reasons.

In the first place the doctrine of election of remedies presupposes a voluntary choice or election of the remedy first resorted to. Thus, this Court has said in *Wm. W. Bierce, L'd,* v. *Hutchins,* 205 U. S. 340, 27 S. Ct. 524 (1907) (p. 346 of 205 U. S.):

> "Election is simply what its name imports. A *choice* shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone." (Emphasis supplied.)*

*See also *Pittsburgh Terminal Coal Corporation* v. *Bennett,* 73 F. (2d) 387 (C. C. A. 3rd, 1934), where the court said (p. 389):

> "Election involves a *choice,* and choice presupposes a knowledge of alternatives and *freedom and opportunity to choose between them.*" (Emphasis supplied.)

But in the present case, as has already been shown, there was no element of choice or voluntary action on the part of petitioner in its separate appearance before the Board in opposition to the employes' unilateral submission, to avoid having a default award entered against it.

In the second place, the doctrine of election of remedies applies only where the remedies are inconsistent. The governing principle with respect to election of remedies has been stated in *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 43 S. Ct. 100 (1922) as follows (p. 295 of 260 U. S.):

> "Any decisive action by a party, with knowledge of his rights and of the facts, determines his *election* in the case of *inconsistent remedies*, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these *inconsistent conclusions.*" (Emphasis supplied.)

Thus, the doctrine that the election of one remedy operates to bar subsequent resort to another remedy requires an inconsistency between the two remedies.. It does not apply where the remedies are not inconsistent and where the change from one remedy to the other does not infringe upon rights which arose as a result of the choice of the prior remedy.*

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* This is pointed out in *McFadden Securities Co.* v. *Stoneleigh Garage*, 55 F. (2d) 1025 (App. D. C., 1932). There a suit upon a lien on cars which the plaintiff had sold to the defendant was held by the District Court to be barred because the plaintiff had previously intervened in an equity receivership proceeding to secure payment for the cars out of funds in the hands of the receiver. The ground of the holding was that the intervention in the receivership proceeding constituted an election of remedies which barred the plaintiff from proceeding directly against the goods sold. The Court of Appeals reversed the District Court's action, saying:

> *"The doctrine of election, where it applies at all, applies only to a case where one assumes an inconsistent position,* or where, through his action, other rights have arisen as to which he should be estopped to take a contrary position. It is never applicable where, as here, a creditor has a right to pursue more than one remedy." (Emphasis supplied.)

To the same effect is *United States* v. *Ickes*, 73 F. 2nd 844 (App. D. C., 1934).

The inconsistency which must exist as a condition precedent to the application of the doctrine of the election of remedies does not consist merely of differences in methods of procedure or forms of actions, but is that which arises from the irreconcilability of legal theories upon which the respective remedies are founded. In the present case there is no such inconsistency between the remedies, *i. e.*, between the theories of the two methods of determination of the controversy here involved. Whether the determination is by application to the Board of Adjustment and suit to enforce the Board's award under Section 3 First (p) of the Railway Labor Act, on the one hand, or by a declaratory judgment proceeding, on the other hand—or for that matter, by a suit in court for damages by the employes, as in the *Moore* case—the rights and liabilities involved are determined by the same contract between the carrier and its employes, and the outcome depends upon the interpretation of that contract, which interpretation must be the same, regardless of the particular form of action in which the interpretation is sought.

Accordingly, the doctrine of election of remedies does not operate, under the facts of the present case, to bar the maintenance by petitioner of the present declaratory judgment proceeding.*

* The fact is that the doctrine of election of remedies is one which today has very limited and infrequent application. Modern courts appear to be viewing the doctrine with an increasing amount of suspicion and to be restricting its application to cases clearly calling for it. Thus, in *Friederichsen* v. *Renard*, 247 U. S. 207, 38 S. Ct. 450 (1918), this Court held that the institution of an equity suit seeking cancellation of a contract and deed for the exchange of lands would not bar a subsequent action at law for damages on the contract because the issues were substantially the same in both cases, although different in form and although the one suit in effect denied the contract while the other affirmed it; and in so holding this Court pointed out that the doctrine of election of remedies "has never been a favorite of equity," and went on to say:

> "At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended, as it must be in order to reach the case at bar" (pp. 211, 213, of 247 U. S.).

To the same effect is *Oil Well Supply Co.* v. *First Nat. Bank of Winfield, Kan.*, 106 F. (2d) 399 (C. A. A. 10th, 1939).

From what has been said above it follows that the majority below have failed successfully to distinguish the present case from the decision of this Court in the *Moore* case. Their attempt to establish such a distinction rests solely upon the erroneous assumption that there was a voluntary choice or election of the statutory method of adjustment on the part of petitioner in appearing before the Board. But there was *no* such voluntary choice or election in the petitioner's separate appearance in opposition to respondents' unilateral submission of the dispute, and the fact therefore remains that, under the decision of the majority below, the operation of the method of adjustment provided in the Act is compulsory, so far as the carrier is concerned, contrary to the construction placed upon the Act by this Court in the *Moore* case.

3. *The Suggestion Tentatively Advanced by the Majority Below, that Section 3 First (p) Might be Construed as Merely Suspending for the Two-year Limitation Period the Carrier's Right to Invoke Relief in Another Form of Proceeding, is Unsound and Demonstrates the Weakness of the Majority's Position.*

The majority below were apparently conscious of the difficulty involved in holding petitioner barred from its right to a judicial remedy, as well as of the difficulty of reconciling their position with the decision of this Court in the *Moore* case. This consciousness of uncertainty seems to emerge in the suggestion made in the majority opinion that perhaps Section 3 First (p) of the Railway Labor Act should be construed not to bar altogether resort to the courts in a proceeding other than that provided therein, after submission to the Board and an award therefrom, but only to *suspend* the right of a carrier to invoke judicial relief in another form of pro-

ceeding during the two-year period following the issuance of the award, in which a suit under Section 3 First (p) can be instituted.*

The suggestion is offered by the majority below apparently as a possible escape from the implied conflict between its decision and the decision of this Court in the *Moore* case, and not as a positive holding of the court. But this suggestion serves merely to increase rather than to diminish the difficulties of the majority below. If Section 3 First (p) of the Railway Labor Act operates to suspend for two years the employer's right to a judicial determination of its dispute with the employes in any other form of proceeding than that provided by that Section, then, for the reasons already indicated (pages 22-28 above), the procedure provided by the Railway Labor Act for adjustment of disputes becomes compulsory upon the carrier *for that period,* in that it does not permit the carrier to obtain a judicial determination of its rights during that period and accordingly allows the economic pressure of the circumstances and of the employes' bargaining power to operate during that period to compel the carrier to comply with the award. To that extent, therefore, Section 3 First (p), as thus construed by the majority below, is an embodiment of a "philosophy of legal compulsion," which, according to the *Moore* decision, was not within the intent of Congress.

Moreover, the suggestion that the carrier's right to a judicial determination of the issues in dispute otherwise than in a suit under Section 3 First (p) is merely sus-

* This appears in the language which the majority below used in connection with the *Moore* case (*e. g.*, R. 338, 345; pp. 243-4, 249 of 124 F. (2d)), especially the following:

"The important thing is that the statute gave the initiative in litigation to review the award to the employee for two years. *For disposing of this case, it is immaterial whether this amounted to a mere suspension, for that period, of the employer's right to sue* or was intended, with other provisions of the Act to bar it altogether" (R. 347; p. 251 of 124 F. (2d)). (Emphasis supplied.)

pended for two years does not provide any basis for dismissal of the present suit at this stage of the proceedings, since the two-year period has now expired, and had in fact expired when the decision of the Court of Appeals below was handed down.* If this suggestion of the majority below were sound—and petitioner believes it is thoroughly unsound and serves merely to demonstrate the confusion in which the majority below find themselves—then, after the two-year period of suspension is over, there would be no reason why the proceeding should not go forward, so as to permit a judicial declaration of the rights of the parties. The reasoning of the majority below in this respect is thus in conflict with their conclusion. If the suggestion made in the majority's reasoning, that the carrier's right to a judicial determination otherwise than in a suit under Section 3 First (p) is merely suspended for two years following submission to the Board and an award therefrom, were really accepted by the majority below as sound, there would be no basis for reaching the conclusion which the majority in fact did reach, to the effect that this suit should be dismissed, even though the two-year period has expired. If, on the other hand, the suggestion is not a sound one—as petitioner believes—then the decision of the majority below must be construed as holding that resort by the carrier to a judicial determination of its rights is completely barred by the employes' unilateral submission of the dispute to the Board and the issuance by the latter of an award upholding the employes' claim. And in that event, for the reasons already shown, the decision of the majority below must be regarded as in conflict with the reasoning of this Court in *Moore* v. *Illinois Central, supra.*

* This case was submitted to the Court of Appeals below on April 18, 1940, and the opinion of that court was not handed down until November 18, 1941 (R. 330-331). The award of the Board was rendered October 24, 1938 (R. 4, 54).

B. Even if it be Assumed that Petitioner's Appearance before the Board Constituted a Voluntary Choice of the Adjustment Method, the Attempt of the Majority Below to Distinguish the Moore Case is Unsound Because it Erroneously Assumes the Point to be Proved, viz., that the Statutory Judicial Remedy Provided by Section 3 First (p) of the Railway Labor Act is Exclusive of all other Judicial Remedies.

Even conceding, however, and solely for the purpose of argument, that the majority below is correct in holding that there was an element of voluntary choice on the part of petitioner in appearing before the Adjustment Board, it does not follow that petitioner is thereby barred from any judicial proceeding for the determination of its contract rights otherwise than in a suit brought by the employes under Section 3 First (p). That conclusion would follow only by making a further assumption, which would be an assumption of the very point to be proved. It would follow only if it is taken for granted that the suit under Section 3 First (p) must be treated as an exclusive judicial remedy with respect to claims which have been submitted to the Adjustment Board. In the absence of any express Congressional intent to make that procedure exclusive, the conclusion that it must be regarded as so is founded by the majority of the Court of Appeals solely on the argument which has already been shown above (pages 33-46) to be erroneous, viz., that otherwise the employes would be deprived of advantages which Congress intended to secure to them. Without the support of that argument, there is no foundation for the conclusion that, even if petitioner did participate in the proceeding before the Adjustment Board, it has thereby lost its right to any judicial remedy that might otherwise be open to it.

In short, the sole ultimate ground upon which the decision of the majority below rests is comprised in the argument that this suit cannot be maintained because it would deprive respondents of the advantages that they

would otherwise obtain from Section 3 First (p) of the Act, and that argument has been shown above to be completely erroneous. In the last analysis, that is the single issue upon which all the other issues now presented to this Court depend.

V. Construction of the Railway Labor Act in the Manner Adopted by the Majority of the Court of Appeals, so as to Preclude Petitioner from Obtaining a Judicial Determination of its Rights in a Declaratory Judgment Proceeding, is to be Rejected because it would Render the Act of Doubtful Constitutionality.

Construction of the Railway Labor Act in the manner adopted by the majority below, whereunder its operation will, as shown above, unfairly and unreasonably suppress judicial consideration and determination of the rights and liabilities of the parties with respect to any dispute which the employes may choose to submit to the Board, is to be rejected for the reason that the Act if so construed would be of doubtful constitutionality. So construed, it would mean that, despite the safeguards of Article 3, Section 1, of the Constitution of the United States, vesting judicial power in the Courts, and of the due process clause of the Fifth Amendment thereto, one of two parties to a contract, viz., the carrier-employer party to a collectively bargained agreement with its employes, would, in the event of a dispute with respect to the interpretation of the contract, be bound by the decision of a non-judicial body of private persons, and would find the doors of the courts closed against it in actual effect, and held closed for a period of time sufficient to enable the other party to the contract to compel by extra-judicial means acquiescence in the construction of the contract favored by such other party. Petitioner submits that such a construction of the Act would not only vest in such non-judicial body the final authority of judicial power which Article 3, Section 1, of the Constitution has preserved to

the courts, but would also deprive petitioner and other like-situated carrier-employers of the due process of law guaranteed by the Fifth Amendment to the Constitution. Such a construction would, in fact, wholly destroy the character of petitioner's collective agreements as contracts, and would turn them into no contracts at all: *Von Hoffman* v. *City of Quincy*, 4 Wall. 535 (1866).* In place of such a result, the court should prefer a construction of the Act which would be consistent with all indications of Congressional intent as to the voluntary nature of the adjustment procedure, and at the same time would preserve to the statute a reasonable and fair operation and eliminate doubts as to its constitutionality.

The difficulties with which the petitioner is confronted, and the denial to it of an opportunity for judicial determination of its rights and liabilities, resulting from the operation given to the Railway Labor Act by the decision of the majority below, present a situation which is closely akin to that in which the petitioners in *Ex Parte Young*, 209 U. S. 123 (1908), and the cases following it, found themselves, and with respect to which this Court granted relief to the petitioners in those cases, in order to avoid violation of their constitutional right to a judicial determination. Those cases firmly establish the proposition that, when a legislature provides a statutory remedy but at the same time interposes such conditions precedent to the availability of the remedy that the hazards or burdens incident to its use in fact operate to deter resort to it, the courts will provide judicial relief in an appropriate proceeding, even though the statutory remedy is plainly intended to be exclusive. Thus, in *Ex Parte Young, supra*, this Court, speaking through Mr. Justice Peckham, said, at pages 163 and 165:

* "Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable." (Page 552 of 4 Wall.).

"It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

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"To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take." (Emphasis supplied.)

As was stated by Mr. Justice Lamar in *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651 (1915), speaking of the constitutionality of legislation fixing rates (pages 660-661):

"And this right to a judicial determination exists whether the deprivation is by a rate statute—passed

without a hearing (as in the *Young* and *Consolidated Gas Cases*); or by administrative orders of a Commission made after a hearing • • • any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been there[by] deprived of a right protected by the Constitution • • •. *But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.*" (Emphasis supplied.)

Similarly, in *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920), a statute authorizing an administrative commission to fix rates for public utility service provided, as the only and admittedly exclusive method of judicial review, that a non-complying utility might be penalized by the commission for its disobedience and such penalty order would be subject to judicial review in which the utility might challenge the legality of the rate order. A utility against which a rate order had been made, instead of waiting for the commission to institute penalty proceedings against it, appealed directly to the courts for injunctive relief, and this Court, in holding that such relief should be granted, said, through Mr. Justice Brandeis (pp. 336-37 of 252 U. S.):

"It appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt • • •. By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to

show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is open to him by way of appeal on the whole record to the Supreme Court. *But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident* * * *. The penalty may apparently be imposed for each instance of violation of the order * * *. *Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements.*" (Emphasis supplied.)*

It should be noted that the exclusive statutory procedure here held inadequate resembles the allegedly exclusive remedy available to petitioner under Section 3 First (p) of the Railway Labor Act in that in both instances the power to institute the judicial proceedings is placed solely in the hands of the other party to the controversy—viz., the commission in the case cited, and the employes in the case at bar. In both instances the complainants are powerless under the statute to take action themselves to set in motion the judicial machinery supposed to be available for their relief. Their hands are tied; and in the interval they are subjected to hazards so great and cumulative that, from the judicial notice which will be taken of what can be expected of reasonable men, it is apparent that such men will prefer not to wait but will yield. Under such conditions the judicial remedy, which is apparently held out by the language of the law, is in substance and reality denied by the facts. It is an illusory and simulated remedy.

Thus, in *Ex Parte Young, supra,* and in the *Wadley Southern* and *Oklahoma Operating Co.* cases, and other

* See also the opinion of Mr. Justice Holmes in *Missouri Pacific Ry.* v. *Nebraska,* 217 U. S. 196, 30 S. Ct. 461 (1910), at pages 207-208 of 217 U. S.

cases following them, it was held that provisions of a statute which in their practical operation, as by the imposition of unduly heavy penalties, deter resort to judicial review for the final determination of basic rights and liabilities are violative of constitutional rights, and persons whose constitutional rights are thus infringed are to be given relief against the operation of such provisions so as to permit a proper judicial determination to be had. So likewise, in the present case, the operation given to the Railway Labor Act by the decision of the majority of the Court of Appeals is such that, as shown above (pages 17-28), petitioner and other carriers against whom awards of the Adjustment Board have been entered are effectively compelled to comply with a non-judicial award while being prevented from obtaining a judicial determination of the rights and liabilities on which such award is purportedly based. Certainly, a construction of the Railway Labor Act which thus tends to deprive petitioner of its constitutional right to judicial consideration of such rights and liabilities is to be rejected in favor of a construction which preserves and protects that constitutional right, as does the construction urged by petitioner.

VI. If for the Purpose of Argument the Adjustment Board is Conceded to be a Quasi-Judicial or Administrative Tribunal—which Petitioner Insists it is Not—Nevertheless the Policy Established by this Court in its Recent Decisions, Especially in Rochester Telephone Corporation v. United States, Disposes of the Contention That the Issues Determined by the Board Should Not Be Subject to Judicial Review, and Makes it Clear that the Declaratory Judgment Procedure is Appropriate for Securing Such Review.

Petitioner has maintained throughout this case, and it still maintains, that the Adjustment Board is constituted

and operates as a wholly non-judicial body, and that its actions and powers do not partake of the character of a public quasi-judicial or administrative tribunal, such as the Interstate Commerce Commission, for example (see pages 17-22 above). For this reason petitioner contends that the present suit is in no sense an effort to obtain a judicial review of the action of such a public quasi-judicial or administrative tribunal, but is merely an attempt to obtain a judicial determination of the basic rights and liabilities involved in an actual controversy between the parties.

But even if it should be conceded—and petitioner does not so concede—that the Adjustment Board is a public quasi-judicial or administrative tribunal, nevertheless it is submitted that petitioner would still be entitled to a judicial review of the action of the Board in this case, under the principles of recent decisions of this Court, especially the decision in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 59 S. Ct. 754 (1939). In that case it was made clear that the policy of this Court is to permit judicial review of orders of administrative tribunals, even where those orders are not of such a character as to command affirmative action.

The suit in that case was brought in equity by the Telephone Company to obtain a review of an order of the Federal Communications Commission, which order held that the Telephone Company was subject to the jurisdiction of that Commission. The order of the Commission did not require the Telephone Company to change its practices or take any other affirmative action, but merely held it subject to the Commission's jurisdiction, although in so doing the order carried with it the requirement of compliance with certain other previously formulated mandatory orders addressed generally to carriers subject to the Commission's authority. The contention was made that the order was not a reviewable one because it was "negative" in character and came within the doctrine

of *Procter & Gamble* v. *United States,* 225 U. S. 282, 32 S. Ct. 761 (1912), and cases following it, which held that so-called "negative" orders of administrative tribunals were not subject to judicial review. This Court, speaking through Mr. Justice Frankfurter, made a full and careful examination of those cases and of the general subject of review of orders of administrative tribunals, and came to the conclusion that the doctrine of non-reviewability of "negative" orders was unsound, and, further, that where certain necessary conditions precedent were established, orders of administrative tribunals were generally reviewable, subject to two doctrines of limitation. The conditions precedent which are required for judicial review of adverse action by an administrativve tribunal were stated to be (page 132 of 307 U. S.): "(*a*) 'case' or 'controversy' under Article 3; (*b*) the conventional requisites of equity jurisdiction; (*c*) the specific terms of the statute granting to the district courts jurisdiction in suits challenging 'any order' of the Commission." The two doctrines which were referred to as limiting such judicial review, when the necessary conditions precedent had been established, were, (*a*) the "primary jurisdiction doctrine," requiring that matters calling for technical knowledge must first be submitted to the Commission, and (*b*) the doctrine of "administrative finality," whereby the scope of judicial review is limited to questions affecting constitutional power, statutory authority, and the basic prerequisites of proof (see pages 139-40 of 307 U. S.).

Thus, the decision of this Court in the *Rochester Telephone* case must be taken to have made it clear that a party adversely affected by the action of an administrative tribunal may, upon a showing of the existence of the necessary conditions precedent, and subject to the limiting doctrines above referred to, assert a right to judicial review of such action, and that it is the policy of the courts to protect the right to such judicial review. Even where no statutory method of review is provided for the

type of administrative action involved, the courts will grant judicial review in some appropriate form, as by the exercise of declaratory judgment jurisdiction: *Perkins* v. *Elg, supra.* Applied to the facts in the present case, the *Rochester Telephone* decision, and the policy which it plainly represents, require that, if the Adjustment Board be conceded to be a quasi-judicial or administrative tribunal, its action in this case, consisting of an award against petitioner, should be subject to judicial review in the present proceeding.

It is clear that the three necessary conditions precedent for such review, referred to in the *Rochester Telephone* case, are present in the case at bar. It has already been shown (pages 28-29 above) that an actual controversy is involved, and the first condition precedent—that a "case" or "controversy" be shown to exist—is therefore established. With regard to the second condition precedent—*i. e.*, "the conventional requisites of equity jurisdiction"—since the present suit is not technically in equity but is under the Federal Declaratory Judgments Act, the requisites which must be shown are those required to establish jurisdiction under that Act; and it has already been demonstrated (see pages 28-32 above) that the necessary requisites for the exercise of declaratory judgment jurisdiction exist in the present case. With regard to the third condition precedent—*i. e.*, compliance with the specific terms of the statute granting to the Court jurisdiction of the suit—the same answer applies, since the statute under which jurisdiction is invoked in this case is the Declaratory Judgments Act, and the necessary jurisdictional requirements thereunder have already been shown to be present (see pages 28-32 above). That the exercise of declaratory judgment jurisdiction to review the action of an administrative agency or tribunal may be proper is shown by the recent decision of this Court in *Perkins* v. *Elg, supra* (see page 32 above).

So far as the limiting doctrines of "primary jurisdiction" and "administrative finality" are concerned, no

obstacle to the present suit is interposed by them. The doctrine of "primary jurisdiction" is not applicable because resort has already been had to the administrative tribunal in question and no further relief from that tribunal is possible; and the doctrine of "administrative finality" does not bar petitioner's present claim, because the question now before the Court is not what the scope of the review shall be but whether or not there shall be any review at all.

Respondents have argued below, and will undoubtedly argue to this Court, that there is no need for a judicial review of the Board's award, because that award, standing alone, has no legal significance or effect and petitioner is in no way adversely affected by it until a suit to enforce it is brought under Section 3 First (p). What respondents appear to have in mind in making this argument is that, since the Board's award is not in the form of an administrative order requiring affirmative action by petitioner, the existence of the award, without an enforcement suit under Section 3 First (p), presents nothing which may properly be the subject of judicial review.

But this argument is completely answered by the decision in the *Rochester Telephone* case. There it was expressly held that the fact that the action of the administrative tribunal does not command affirmative conduct is no bar to a judicial review at the instance of a party adversely affected by the legal consequences of the administrative action. As Mr. Justice Frankfurter said (p. 132 of 307 U. S.):

> "Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, as was the case in *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412, or where the Commission's order denies an exemption from the terms of the statute, as in the *Inter-Mountain Rate Cases,* 234 U. S. 476, *the road to the courts' jurisdiction seems to be*

> *clear.* There is a constitutional 'case' or 'controversy,' *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties;* and the suit is within the express language of the Urgent Deficiencies Act in that it is one 'to enjoin, set aside, or annul' an 'order of said Commission.' 28 U. S. C. Secs. 46, 47." (Emphasis supplied.)

In the present case, it is clear that the award of the Board does have legal consequences which adversely affect petitioner. In the first place, the mere existence of the award operates, as shown above (pages 22-28), to impose increasing pressure upon petitioner to comply with respondents' demands; or, in the language of Mr. Justice Frankfurter, "disregard of the [Board's] adverse action entails threat of oppressive penalties." The fact that the penalties would result, not from a statutory provision penalizing disobedience, but from the cumulative nature of the award itself, can make no difference, since the penalties are nonetheless real and oppressive and are threatened as a result of the Board's action. In the second place, the award of the Board has very definite legal consequences if its existence is sufficient to bar petitioner from a judicial determination of its rights and liabilities under the contract with its employes. If no award of the Board were outstanding, petitioner's right to a declaratory judgment would be clear, since an actual controversy with respect to the contract between petitioner and its employes would be presented by respondents' claims, which were first advanced before the dispute was submitted to the Board (R. 8). But if the majority below are correct, the existence of the Board's award creates a bar to the right which petitioner would otherwise have of obtaining a judicial determination of its obligations under the contract, and, therefore, the Board's

action in rendering the award has very serious legal consequences adverse to petitioner's interests.*

It follows that respondents' argument to the effect that the award of the Board standing alone requires no action on the part of petitioner and has no legal significance or adverse effect on petitioner's interests must be rejected as unsound, in view of the *Rochester Telephone* decision.

Plainly, the policy established in the *Rochester Telephone* case requires that the decision of the majority of the Court of Appeals below in this case should be reversed and the suit permitted to proceed so that judicial consideration of the issues involved in the award of the Adjustment Board against petitioner may be had. The

* The fact that awards of the Adjustment Board are not without legal effect or significance is shown by the decision in *Delaware & Hudson R. Corporation* v. *Williams*, 129 F. (2d) 11 (C. C. A. 7th, 1942). In that case a number of employe-carrier disputes had been submitted to a Division of the National Railroad Adjustment Board. In accordance with the usual practice, a referee was called in to break the deadlock between the carrier members and the employe members of the Division. While the disputes were still being considered by the referee, the employes apparently learned in some way that the referee had made up his mind to decide the disputes against them. Upon receiving this information the employes' organization promptly notified the Division by phone and by wire that the disputes were withdrawn from the Division's consideration. Subsequently, some of the same disputes were resubmitted to the Division by the same disputants, and it appeared from the allegations in the case that all the disputes would soon be resubmitted. The carrier brought suit to compel the members of the Division to proceed to a conclusion of the Division's consideration of the disputes as first submitted. The District Court held that it was without jurisdiction of the suit, but the Court of Appeals reversed the District Court, being plainly impressed with the injustice of permitting a disputant before the Board to withdraw, upon learning of an impending unfavorable decision, for the purpose of resubmitting the dispute in the hope of receiving more favorable treatment from another referee. In so doing the Court of Appeals held that the District Court had jurisdiction to grant mandatory relief to compel the Division, not to reach a particular conclusion, but to proceed with its consideration and to reach some conclusion with respect to the disputes before it. This holding is clearly inconsistent with the supposition that the proceedings before the Board, culminating in an award in favor of one or the other of the disputants, are without legal significance, since there would be no point in requiring the Board to proceed to a conclusion and to the rendering of an award if such award was to have no legal significance or consequences.

wisdom of the policy of thus protecting the right to judicial consideration is demonstrated with particular clarity by the facts of the present case. To construe the Railway Labor Act, as the majority below have done, so as to bar petitioner from the right to bring the present proceeding, is in practical effect, as shown above, to preclude a carrier from any judicial determination of its rights under the contract with its employes, in a case where the employes have seen fit to submit a dispute to the Adjustment Board and thereby compel the carrier, without its consent, to be subjected to an award of the Board against it and to economic pressure toward compliance with the award. Clearly, such a result is unjust and unreasonable. If the collectively bargained agreements to which the Act is intended to apply are really contracts, then there must be some practicable and available means for the parties, or either of them, to obtain a judicial determination as to the proper interpretation of the contract and their respective rights and obligations under it. *Otherwise, the effect of the Act would be—and, under the decision of the majority below, its effect is—to place these collectively bargained agreements in the same category as international treaties, which under present-day conditions have only such meaning and effect as the party with superior force chooses to allow them to have.* Petitioner believes that the Railway Labor Act should not be construed so as to reproduce international anarchy in the field of labor relations in the railroad industry, unless there is a clear and positive indication in the legislative history of the Act or on the face of the Act itself that Congress intended it to be so construed. But, as shown elsewhere in this brief (pages 33, 84-85), there is no such indication either in the legislative history of the Act or on the face of the Act itself.

It is therefore submitted that, since the necessary conditions precedent for judicial review of adverse administrative action are present, and no obstacle is interposed

by the doctrines of limitation upon such review, the policy of protecting the right to such review, manifested in Mr. Justice Frankfurter's opinion in the *Rochester Telephone* case, and applied in the holding of this Court in *Perkins* v. *Elg, supra,* is particularly appropriate for application in the present case, in the light of its peculiar facts. It follows that, even if it be assumed, contrary to petitioner's primary contentions, that the Adjustment Board is a public administrative tribunal entitled to stand in the same class with the Interstate Commerce Commission, for example, nevertheless the present suit should be allowed to proceed on the merits, so that petitioner may obtain a judicial review, otherwise denied to it, of administrative action adverse to its interests.

VII. To Allow the Judicial Relief Sought in This Proceeding Would not Render the Provisions of the Railway Labor Act as Intended by Congress Unworkable, and is not Forbidden by the "Policy" of that Act.

Throughout their arguments in the courts below, respondents repeatedly suggested, sometimes expressly and sometimes by implication, that to allow the judicial relief sought in this proceeding would in some way render the provisions of the Railway Labor Act, as intended by Congress, unworkable, and would be contrary to the "policy" of that Act. This suggestion was supported not by reference to the provisions of the Act but by considerations *dehors* the language of the statute, which it was intimated should govern the construction of those provisions. Thus, the fact that Congress, by the Railway Labor Act, has established a permissive procedure for the informal adjustment of disputes between carriers and their employes was seized upon as a basis for attributing to Congress an intention to make judicial procedure unavailable, and for attributing to Congress "the probable intent of making resort to the courts unattractive to the

carriers." (Defendants' Memorandum Brief, pp. 37-38, R. 103-104.)

In support of the contention that Congress was actuated by an intent to make judicial procedure unavailable, respondents have quoted the following language from the report of the Committee of the House of Representatives on Interstate and Foreign Commerce, recommending the passage of the Railway Labor Act:

> "The major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as grievances, which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions. * * * This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." (Defendants' Memorandum Brief, p. 68, R. 134.)

Certainly all that this language can be made to mean is that the settlement of controversies by compromise or "adjustment" is desirable. It says nothing, and implies nothing, in disparagement of the right to a judicial determination of legal issues which cannot be settled by compromise or adjustment. On this latter point there is clear and explicit language in a passage from an opinion by this Court, in *Penna. R. R.* v. *Labor Board*, 261 U. S. 72, 43 S. Ct. 278 (1923), at page 84 of 261 U. S., quoted by respondents in their brief above referred to. (Defendants' Memorandum Brief, p. 69, R. 135.) In that case, this Court said, speaking of the functions of an earlier board from which the present National Railroad Adjustment Board has evolved:

> *"But title 3 was not enacted to provide a tribunal to determine what were the legal rights and obliga-*

tions of railway employers and employees, or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. It was to reach a fair compromise between the parties, without regard to the legal rights upon which each side might insist in a court of law." (Emphasis supplied.)

Here is the clearest possible statement of what respondents have ignored. In the language just quoted, this Court recognizes and emphasizes that there is a useful and important function to be performed in promoting and facilitating compromise and cooperation between employes and employers, and that this is a different function from the protection of legal rights. The recognition of this fact does not, however, carry with it the conclusion, as respondents seem to assume, that legal rights should, therefore, be deprived of protection. As the passage quoted above from the opinion points out, the protection of legal rights is the function of the courts, not of the agency of "adjustment." The fact that an agency of adjustment has been established by Congress does not, therefore, indicate any intention on the part of Congress to preclude resort to the courts and thereby prevent the enforcement and protection of legal rights.

It seems clear, both from the language of this Court quoted above and from an analysis of the provisions of the Railway Labor Act, that that Act, in establishing a machinery of adjustment through the National Railroad Adjustment Board, did not intend that machinery to be exclusive or compulsory, as the respondents' argument assumes. The argument that the possibility of resort to the courts by the carriers would render the Railway Labor Act unworkable assumes that it is the purpose of that Act to preclude such resort to the courts and to render the adjustment procedure exclusive and compulsory, and

that this purpose would be defeated, as of course it would be, by permitting a judicial determination by the courts of the legal issues involved. But the decisions of this Court in both the *Moore* case (see pages 53-66 above) and in *Penna. R. R.* v. *Labor Board, supra,* make it plain that the machinery of adjustment provided in the Railway Labor Act was not intended to be compulsory or exclusive.

Although it is, therefore, clearly untenable to contend that Congress, by the establishment of adjustment procedure in the Railway Labor Act, intended to oust the jurisdiction of the judicial courts, nevertheless respondents have sought to derive some benefit from that contention by arguing that Congress must be held to have at least intended to minimize access to the courts, and, from this supposed intention to minimize access to the courts, respondents then seek support for the further inference that a Congressional intent to foreclose access to the courts, except through the statutory suit provided by Section 3 First (p) of the Act, must be supposed. In making this argument, respondents have throughout suggested that any other construction would interfere with the "workability" of the Act, as allegedly intended by Congress. In other words, their contention is that, if the employer is held to be entitled to a judicial determination of his contract rights and obligations in a proceeding brought on his own initiative, and is not confined to the illusory opportunity of such determination in a suit which theoretically might be, but in fact never will be, brought by the employes under Section 3 First (p) of the Act, then the provisions of the Railway Labor Act will be rendered unworkable and the operation of the Act, as supposedly intended by Congress, will be interfered with and hampered. By what process of reasoning can such a conclusion be reached?

The underlying thought of the respondents, in arguing that the Railway Labor Act would be rendered unworkable and its operation interfered with if such a suit as

is here involved were permitted, can only be based upon a theory of the Act which holds that its purpose and intent is primarily to clear the way for the operation of the economic bargaining power of the employes. Respondents, in some of the contentions which they advanced below, apparently assumed that the normal and proper sanctions of the Railway Labor Act, particularly as respects the orders of the Adjustment Board, consist in the "bargaining power" of the employes. As respondents have argued, "the orders of the Board find their primary sanction in the collective economic bargaining power of the employees." (Defendants' Memorandum Brief, p. 37, R. 103.) In other words, the argument of respondents is apparently that the procedure under Section 3 First (p) must be held to be exclusive in order that the employer may be placed in a position where the "economic bargaining power" of the employes, through their right to strike, can be enforced against it in a way which would not be possible if it was permitted access to the courts on the employer's own initiative, and that this result is necessary to give "effectiveness" to the awards of the Adjustment Board and so make the Railway Labor Act workable.

Assuming, as respondents do, that the "economic bargaining power" of the employes is the true sanction for enforcement of the awards of the Adjustment Board, the purpose of holding that Section 3 First (p) provides an exclusive judicial remedy is simply to subject the employer "effectively" to that "economic bargaining power," and to give him no way of escape therefrom by submitting his legal rights for adjudication to a court of law. Respondents frankly assume that the Railway Labor Act must be construed as evidencing an intention on the part of Congress to accomplish the foregoing result, viz., that it was the intention of Congress to subject the employer to economic pressure, and that in order to accomplish this result the employer must be held to have no other

opportunity for a judicial determination of his rights than the illusory one afforded by Section 3 First (p). From the standpoint of this construction of the Act, they contend that the exclusive character of the judicial remedy under Section 3 First (p) forms what they call an "integral part of the whole Congressional plan." (Defendants' Memorandum Brief, p. 36, R. 102.)

If the Congressional plan and policy under the Railway Labor Act of 1934 should be held to be what respondents thus contend that it is, then that plan amounts to nothing less than the surreptitious establishment of a scheme of compulsory arbitration of a novel and unprecedented character, and represents a complete revolution from the plan embodied in previous Railway Labor Acts.

There is nothing in the legislative history of the Railway Labor Act of 1934 to indicate that Congress thought it was effecting any such revolution in its previous policy. If the Act should be found to have accomplished such a result, it was accomplished without the conscious intent, or even knowledge, of Congress. The reports of the House and Senate Committees recommending the enactment of the Railway Labor Act of 1934 presented that Act as intended to cure two supposed defects in the Act of 1926, viz., failure to establish adjustment boards, and lack of any provision for an umpire in the event that an adjustment board deadlocked.* No statement was made that there was in contemplation any essential change in the nature or functions of the adjustment boards, or in the legal status of their awards.† At the same time, without any discussion in the Committee reports or on the floor of either House,‡ there was added Section 3 First (p), which

* See House Report No. 1944 and Senate Report No. 1065, 73d Congress, Second Session.

† In fact the House Committee in its report specifically stated that "the bill does not introduce any new principles into the existing Railway Labor Act." (P. 2 of House Report No. 1944, 73d Congress, Second Session.)

‡ See Congressional Record for June 15, 1934, Vol. 78, Pt. 11, at pages 11710-20, and Congressional Record for June 18, 1934, Vol. 78, Pt. 11, at pages 12369-76, 12384-88, and 12389-402.

simply purported to provide a specially favorable form of remedy through which employes might enforce in the Federal courts claims which had won the support of the Adjustment Board. Respondents are now taking the position that these provisions of Section 3 First (p), which found their way into the bill without even the honor of special mention by the Congressional Committees, and without any discussion on the floor of Congress, must be given a construction which, if adopted, would have the effect of substituting for the informal "adjustment" procedure of previous statutes a scheme which amounts to a novel system of compulsory arbitration. To assume that Congress, in enacting the Railway Labor Act, in fact intended to establish any such system of compulsory arbitration is contrary to the decision of this Court in *Moore* v. *Illinois Central R. Co.* (see pp. 53-66 above), and also its decision in *Penna. R. R.* v. *Labor Board, supra* (see pp. 80-81 above).

Respondents' argument in the courts below was in substance that the policy and intent of the Railway Labor Act in its present form is to permit the employes to force the employer into a proceeding before the Adjustment Board without the employer's consent, and, after that Board has made its award, the "effectiveness" of the award is protected, respondents contend, against judicial interference by excluding the controversy from judicial examination unless the employes, having won before the Board, elect—as in fact for good and sufficient reasons they never do—to bring a suit under Section 3 First (p), instead of preferring to rely on their "collective economic bargaining power" which they claim to be the "primary sanction" of the award.

This is clearly compulsory arbitration of a novel and extraordinary kind, especially in view of the nature of the controversies which are subjected to it. The controversies which under the Railway Labor Act may be submitted to

the National Railroad Adjustment Board are disputes growing "out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (Section 3 First (i)). In other words, they are disputes which involve the interpretation of contracts and the determination of the respective rights and obligations of the parties. Such questions are fundamentally legal ones. When two parties make an agreement, there is no true contract unless each party assumes a legal duty to abide by the terms of the contract in accordance with the meaning of those terms as interpreted according to rules of law. Each party has a legal right to look to the other for such compliance. He has given consideration on his own part for the right to demand such compliance on the part of the other. If, while the contract is still in force, he can be told with finality that he is no longer entitled to demand such compliance, but must accept performance of a different kind, or must give other and different consideration for continued compliance, the original agreement cannot be said to have been a contract in any true sense. It affords no basis for reliance and reasonable expectation, and performs no function in defining reciprocal rights and obligations.

It is clear, from the respondents' discussion in the courts below of the functions and methods of operation of the Adjustment Board, that in their view that Board does not undertake to adjudicate or determine the legal rights and obligations of the parties under their contracts at all, and that its awards do not even purport to be based upon those rights and obligations. As respondents have stated below:

> "*The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.

"The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. *With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary.* It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. *The future of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption."* (Defendants' Memorandum Brief, pp. 66-67, R. 132-133.)

From this statement of respondents as to the functions of the National Railroad Adjustment Board, which petitioner accepts as an accurate description of what the Board does, and of the way in which it views its own functions, it is plain that the Board, in the exercise of the power conferred upon it by Section 3 First (i) of the Railway Labor Act to decide disputes growing out of the interpretation of agreements, does not purport in its decisions to give effect to the actual meaning of the agreements, or to determine rights and obligations in

accordance with the terms of the agreements, but that on the contrary its awards may disregard those terms and completely alter the rights and obligations of the parties thereunder, if in the opinion of the Board to do so would promote the future cordial relations of the parties. This being so, it is entirely possible that an award of the Board in a dispute growing out of the interpretation of a contract may abolish the obligations of one party to the contract and may impose on the other new obligations not contained in the contract. Obviously such an award, which settles a dispute concerning the interpretation of a contract by disregarding the contract, is not a determination of contract rights, and, if parties to a contract are placed by the provisions of law in a position where they have no recourse but to submit to such awards, then the contract in question ceases to be a contract in any proper legal sense and becomes a bare interchange of words.

Agreements or contracts arrived at by collective bargaining between railroads and their employes will be reduced to this state of practical nullity if the Railway Labor Act should be construed to embody such a scheme of compulsory arbitration, as respondents contend. The effect of their contention if adopted by this Court would be to hold that final and conclusive power to interpret and apply such agreements is vested in a body which is in fact not bound by the agreements but may depart from or disregard them altogether in making its decisions. This would indeed be a novel and extraordinary form of compulsory arbitration. Surely, such a construction is not to be placed upon the Railway Labor Act without some clear and unmistakable indication that it was intended by Congress; and, as already shown, there is no such indication, or any indication, of such an intent in either the language or the legislative history of the Act. On the contrary, the conclusion is inescapable that there is no ground whatever for the contention that to allow

the judicial relief prayed for in the present proceeding would be to construe the Act in a manner contrary to its policy, or in a manner which would render it unworkable.

CONCLUSION.

Petitioner submits that in the above argument it has shown:

First, the decision of the majority of the Court of Appeals below places upon the Railway Labor Act a construction which is not warranted by anything in the language or legislative history of the Act, and is unreasonable, because it gives to that Act an operation which, on the facts of the case, compels a carrier-employer to submit to the "adjustment" by a non-judicial body of the legal rights and obligations of such carrier-employer under a contract with its employes, and then, after such adjustment, deprives the carrier of any real or effective opportunity for a judicial determination of such rights and obligations;

Second, the exercise of declaratory judgment jurisdiction is appropriate in this case and is not barred by any statutory impediment, and the majority below, in concluding otherwise, have made the mistake of assuming that Section 3 First (p) of the Railway Labor Act must, in order to preserve to the employes advantages which Congress intended them to have under that Section, be construed to exclude any other proceeding, such as the present one, for the judicial determination of the rights and liabilities of the carrier and its employes under their contract, whereas the fact is that the institution of a proceeding like the present one, for a declaratory judgment, would not in any way bar the employes from instituting a proceeding under Section 3 First (p) of the Act and thereby securing for themselves any advantages which Congress may have intended them to have thereunder;

Third, the decision of the majority of the Court of Appeals, in so construing the Railway Labor Act as to give the adjustment procedure provided therein a compulsory effect in its practical operation, is in conflict with the reasoning in *Moore* v. *Illinois Central R. Co.,* wherein this Court held that such adjustment procedure constituted a purely voluntary, non-compulsory system for adjustment and mediation, and the fact that petitioner appeared before the Adjustment Board in this case to defend itself against respondents' unilateral submission, without petitioner's joinder or concurrence, of the dispute to the Board, did not constitute a choice or voluntary election on petitioner's part of the method of adjustment provided in the Railway Labor Act, since such appearance in opposition to the respondents' unilateral submission was essential from petitioner's standpoint in order to avoid the default award which the Board would otherwise have entered against it;

Fourth, the construction given the Railway Labor Act by the majority of the Court of Appeals, whereby petitioner is precluded from obtaining a judicial determination of its rights in a declaratory judgment proceeding, and therefore, as a practical matter, from obtaining such determination in any proceeding, is to be rejected because it would render the Railway Labor Act of doubtful constitutionality;

Fifth, even if the Adjustment Board is conceded to be a quasi-judicial or administrative tribunal—which petitioner insists it is not—nevertheless, the policy established by this Court in its recent decisions, especially in *Rochester Telephone Corporation* v. *United States,* disposes of the contention that the issues determined by the Board should not be subject to judicial review, and makes it clear that the declaratory judgment procedure is appropriate for securing such review; and

Finally, to allow the judicial relief sought in this proceeding would not render the provisions of the Railway

Labor Act as intended by Congress unworkable, and is not forbidden by the "policy" of that Act, and respondents, in contending that the Act would thus be rendered unworkable, have presupposed a Congressional intent to establish a system of compulsory arbitration which would be novel and unprecedented in character, and which is in fact not disclosed as having been intended by Congress in any portion of the language of the Act or in any of its legislative history.

This case is of basic importance, not only because of the size and character of respondents' claims, but also because of the operating practices involved, which petitioner, believing such practices to be essential to the efficiency of its operation and desirable in the public interest, should not be compelled to change until its obligation to do so has been judicially determined. The continuation of such operating practices, and other like operating practices, may give rise to additional and increasingly numerous claims of the same nature, on the part of these or other similarly situated employes, and with respect to such claims petitioner and other carriers in petitioner's position will be without practical means of obtaining a judicial determination of the rights and liabilities of the parties if the relief herein sought is not granted. If the decision of the majority of the Court of Appeals below is permitted to stand, a strong element of unfairness and unreasonableness will have been injected, in the name of the Railway Labor Act although without any indication of Congressional approval or intent, into the relations between carriers and their employes.

Respectfully submitted,

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SEPTEMBER 25, 1942.